(27,460)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 237.

SARAH MARY WALL, ADMINISTRATRIX OF THE ESTATE OF EDWARD WALL, DECEASED, PLAINTIFF IN ERROR,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 And thereupon on the same day, to-wit, on the 8th day of June, A. D. 1899, a certain Præcipe was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

Circuit Court of Cook County, —— Term, A. D. 1899.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased, Plaintiff,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation, Defendant.

Case.

Damages, $2,000.00.

The Clerk of said Court will issue summons in the above entitled cause to said Defendant in a plea of Trespass on the Case to the damage of said Plaintiff in the sum of Two Thousand Dollars, direct the same to the Sheriff of Cook County to execute and make it returnable to the June Term of said Court, A. D. 1899.

BULKLEY, GRAY & MORE,
Plaintiff's Attorneys.

To John A. Cooke, Esq., Clerk.

Chicago, June 8th, 1899.

2 For that whereas, the defendant, on, towit, the 24th day of May, A. D., 1896, was possessed of and using and operating a certain railway extending from, to-wit, the city of Cincinnati, in the state of Ohio, to, to-wit, Newport News, in the state of Virginia, to-wit, in the county aforesaid, and was also the owner of and using and operating certain cars, engines and trains for the carriage and conveyance of freight and passengers for a reward in that behalf.

Plaintiff further avers that on and prior to, to-wit, the 24th day of May, A. D. 1896, the said Edward Wall was engaged in the business of accompanying and caring for cattle and live stock being shipped and imported from the city of Chicago over various railroads to eastern markets, and was and had been in the employ of Nelson Morris & Company; that on or about, to-wit, the 23rd day of May, A. D. 1896, the said Edward Wall took charge of certain cars of live stock to be shipped and transported for and on behalf of the said Nelson Morris & Company, from, to-wit, the city of Chicago, in the state of

Illinois, to to-wit, Newport News, in the state of Virginia, to-wit, in the county aforesaid; that said cars of live stock were to be hauled and transported by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company from the city of Chicago, aforesaid, to to-wit, the city of Cincinnati, in the state of Ohio, and from the said city of Cincinnati in the state of Ohio aforesaid, to, to-wit, Newport News, in the state of Virginia, by the defendant; and the defendant did then and there undertake to and did transport over its said road from to-wit, the city of Cincinnati to, to-wit, Newport News, aforesaid, the said carloads of livestock, and it was then and there the duty of the said Edward Wall to accompany said live stock upon the said trains of the defendant, and being so in charge and control of the said loads of live stock and caring for same, the said Edward Wall was

3 entitled to passage over the defendant's railroad on trains conveying said live stock, and to be furnished a safe and suitable place to ride in during said journey, and to be safely carried and transported on the trains of the defendant so conveying or hauling said car loads of live stock from to-wit, the city of Cincinnati, to, to-wit, Newport News, aforesaid, for a reward in that behalf.

Plaintiff further avers that when said cars of live stock and the said train upon which said Edward Wall had taken passage, arrived at the city of Cincinnati, the engine and the car or caboose provided for the said Edward Wall to ride in by the said Cleveland, Cincinnati, Chicago and St. Louis Railway, were detached and thereupon said cars of live stock were turned over to and taken in charge by the servants and agents of the defendant, and were attached to a locomotive engine of the defendant to be transported over the road of the defendant from the said city of Cincinnati, to the city of Newport News, aforesaid, and it then and there became and was the duty of the defendant to attach to said train a caboose or car, or other safe and suitable place in which the said Edward Wall could safely ride in order to accompany said cars of live stock, as he was in duty bound to do, and as the defendant well knew; but the said railroad company failed and neglected so to do, or to furnish other place than the top of said cars where the said Edward Wall could then and there ride in accompanying said cars of live stock through the city of Cincinnati in the state of Ohio, as aforesaid.

Plaintiff further avers that after the said cars were taken in charge by the said defendant, the tracks used by the said defendant company over which said train was being hauled, passed under certain street bridges or viaducts, in the city of Cincinnati and state of Ohio, commonly known as, to-wit, the Fremont Street bridge or viaduct, the Sixth street bridge or viaduct, the Fifth Street bridge or viaduct, and the Third Street bridge of viaduct; that said bridges or

4 viaducts and said railroad over which said train was being hauled by the said defendant company was so constructed that not sufficient space remained between the top of said cars and said viaducts or bridges for persons on top of said cars to safely pass thereunder; that said space did not exceed, to-wit, the space of three feet; that it was well known to the defendant to be dangerous for persons to ride on the tops of cars passing under such bridges or viaducts.

Plaintiff further avers that while said train of cars was being so hauled by the defendant, and while no caboose or car was attached to said train or other place provided in which said Edward Wall could safely ride, and while he was with all due care and diligence on his part riding on top of said train of cars so caring for the said cars of live stock, and so performing his duty in that behalf, and not knowing the danger from said bridges or viaducts, he was struck with great force and violence by one of said bridges or viaducts under which said train was being hauled, to wit, the Sixth Street bridge or viaduct and was thereby thrown down with great force and violence and thereby received great injuries, to wit his back was broken and otherwise greatly injured and bruised, inasmuch and by means whereof the said Edward Wall then and there died.

Plaintiff further avers that the said defendant was negligent in this, that it failed to furnish said Edward Wall a safe place in which to ride while accompanying and caring for said car loads of live stock or warn him of the danger he incurred in so riding in the place so provided for him to ride in by the said defendant, viz: the top of said cars.

Plaintiff further avers that the said injuries causing the death of the said Edward Wall, occurred in, to wit, the city of Cincin-
3 nati, and state of Ohio, to wit, in the country aforesaid, and that by the statutes of the state of Ohio in force at the time of such injury it is provided among other thing thaa whenever the death of a person shall be caused by the wrongful act or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the corporation which or person who would have been liable if death had not ensued, shall be liable for the damages notwitstanding the death of the person injured, etc.: and it is also further provided that every such action shall be for the exclusive benefit of the wife or husband and children or if there be neither of them, then of the parents and next of kin, of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person, and in every such action the jury may give damages not to exceed in any case $10,000.00, as they may think proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought.

Plaintiff further avers that the said Edward Wall left him surviving Sarah Mary Wall, his wife, one Edwin Wall, his son, and one Marie Wall, his daughter, who are still living; that by reason of the death of the said Edward Wall aforesaid, said Sarah Mary Wall has been deprived of her means of support, and the said Edwin Wall and Marie Wall were then and there deprived of their means of support and education.

6 For that whereas, also the defendant, on, to wit, the 24th day of May, A. D., 1896, was possessed of and using and operating a certain railway extending from, to wit, the city of Cincinnati, in the state of Ohio, to, to wit, Newport News, in the state of

Virginia, to wit, in the county aforesaid, and was also the owner of and using and operating certain cars, engines and trains for the carriage and conveyance of freight and passengers for a reward in that behalf.

Plaintiff further avers that on and prior to, to wit, the 24th day of May A. D. 1896, the said Edward Wall was engaged in the business of accompanying and caring for cattle and live stock being shipped and transported from the city of Chicago over various railroads to eastern markets, and was and had been in the employ of Nelson Morris & Company; that on or about, to wit, the 23rd day of May, A. D. 1896, the said Edward Wall took charge of certain cars of live stock to be shipped and transported for and on behalf of the said Nelson Morris & Company, from, to wit, the city of Chicago, in the state of Illinois, to, to wit, Newport News, in the state of Virginia, to wit, in the county aforesaid; that said cars of live stock were to be hauled and transported by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company from the city of Chicago, aforesaid, to to wit, the city of Cincinnati, in the state of Ohio, and from the said city of Cincinnati in the state of Ohio aforesaid, to, to wit, Newport News, in the state of Virginia, by the defendant; and the defendant did then and there undertake to and did transport over its said road from to wit, the city of Cincinnati to, to wit, Newport News, aforesaid, the said cars of livestock, and it was then and there the duty of the said Edward Wall to accompany said live stock upon the said trains of the defendant, and being so in charge and control of the said car loads of live stock and caring for same, the said Edward Wall was entitled to passage over the defendant's rail-
7 road on trains conveying said live stock, and to be furnished a safe and suitable place to ride in during said journey, and to be safely carried and transported the trains of the defendant so conveying or hauling said car loads of live stock from to wit, the city of Cincinnati, to, to wit, Newport News, aforesaid, for a reward in that behalf.

Plaintiff further avers that when said cars of live stock and the said train upon which said Edward Wall had taken passage, arrived at the City of Cincinnati, the engine and the car or caboose provided for the said Edward Wall to ride in by the said Cleveland, Cincinnati, Chicago and St. Louis Railway Company, were detached and thereupon said cars of live stock were turned over to and taken in charge by the servants and agents of the defendant, and were attached to a locomotive engine of the defendant to be transported over the road of the defendant from the said city of Cincinnati, to the city of Newport News, aforesaid, and it then and there became and was the duty of the defendant to attach said train or caboose or car, or other safe and suitable place in which the said Edward Wall could safely ride in order to accompany said cars of live stock, as he was in duty bound to do, and as the defendant well knew; but the said railroad company failed and neglected so to do, or to furnish other place than the top of said cars where the said Edward Wall could then and there ride in accompanying said cars of said live stock through the city of Cincinnati in the state of Ohio, as aforesaid.

Plaintiff further avers that after the said cars were taken in charge by the said defendant, the tracks used by the said defendant company over which said train was being hauled, passed under certain street bridges or viaducts, in the city of Cincinnati and state of Ohio, commonly known as, to wit, the Fremont Street bridge or viaduct, the Sixth street bridge or viaduct, the Fifth Street bridge or viaduct, and the Third Street bridge or viaduct; that the bridges or viaducts and said railroad over which said train was being hauled by the said defendant company was so constructed that not sufficient space remained between the top of said cars and said viaducts or bridges for persons on top of said cars to safely pass thereunder; that said space did not exceed, to wit, the space of three feet; that it was well known to the defendant to be dangerous for persons to ride on top of cars passing under such bridges or viaducts.

Plaintiff further avers that while the train of cars was being so hauled by the defendant, and while no caboose or car was attached to train or other place provided in which said Edward Wall could safely ride, and while he was with all due care and diligence on his part riding on top of said train of cars so caring for the said cars of live stock, and so performing his duty in that behalf, and not knowing the danger from said bridges or viaducts, he was struck with great force and violence by one of said bridges or viaducts under which said train was being hauled, to-wit, the Sixth Street bridge or viaduct and was thereby thrown down with great force and violence and thereby received great injuries, to-wit his back was broken and otherwise greatly injured and bruised, insomuch and by means whereof the said Edward Wall then and there died.

Plaintiff further avers that the said defendant was negligent in this, that it failed to furnish said Edward Wall a safe place in which to ride while accompanying and caring for said carloads of live stock or warn him of the danger incurred in so riding in the place so provided for him to ride in by the said defendant, viz; the top of the cars.

Plaintiff further avers that the said injuries causing the death of the said Edward Wall, occurred in, to-wit, the city of Cincinnati, and state of Ohio, to-wit, in the country aforesaid and that by the statutes of the state of Ohio in force at the time of such injury it is provided among other things than whenever the death of a person shall be caused by the wrongful act or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the corporation which or person who would have been liable if death had not ensued, shall be liable for damages notstanding the death of the person injured, etc.; and it is also further provided that every such action shall be for the exclusive benefit of the wife or husband and children or if there be neither of them, then of the parents and next of kin, of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person, and in every such action the jury may give such damages not to exceed in any case $10,-

000.00, as they may think proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought. Every such action
10 shall be commenced within two years after the death of such deceased person.

And it is further provided that if an action commenced or attempted to be commenced in due time, a judgment for plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits and the time limited for the commencement of such action has at the date of such reversal or failure, expired, the plaintiff, or if he die and the *course* of action survive, his representative may commence a new action within one year after such date, and this provision shall apply to any claim asserted in any pleading by a defendant.

Plaintiff further avers that on, towit, the 29th day of March, 1898, and within two years of the death of said deceased and the time said cause of action accrued, a suit was commenced in the Circuit Court of Cook County, state of Illinois by the plaintiff herein against the defendant herein for damages for injuries causing the death of said Edward Wall; that said action was removed by defendant, the Chesapeake & Ohio Railway Company, from the Circuit Court of Cook County to the Circuit Court of The United States for the Northern District of Illinois; that after said removal the said defendant filed a motion in *in* that court to quash the service of summons upon the said defendant, which said motion was granted by the Circuit Court of the United States for the Northern District of Illinois, and said cause was thereupon dismissed by the said court on, to-wit, the 28th day of November, A. D. 1898; thereupon the plaintiff commenced this action within one year next ensuing after the dismissal of said cause of action by the Circuit Court of the United States for the Northern District of Illinois.

Plaintiff further avers that said cause of action which was so dismissed by the Circuit Court of the United States for the Northern District of Illinois was never tried upon the merits, and that
11 the cause of action is said suit so dismissed by the said Circuit Court of the United States is the same cause of action as is herein alleged.

Plaintiff further avers that the said Edward Wall left him surviving Sarah Mary Wall, his wife, one Edwin Wall, his son, and one Marie Wall, his daughter, who are still living; that by reason of the death of said Edward Wall, aforesaid, said Sarah Mary Wall has been deprived of her means of support, and the said Edwin Wall and Marie Wall were then and there deprived of their means of support and education.

12 For that whereas, also the defendant, on, towit, the 24th day of May, A. D., 1896, was possessed of and using and operating a certain railway extending from, to-wit, the city of Cincinnati, in the state of Ohio, to, to-wit, Newport News, in the state of Virginia, to-wit, in the county aforesaid, and was also the owner of and using and operating certain cars, engines and trains for the carriage and conveyance of freight and passengers for a reward in that behalf.

Plaintiff further avers that on and prior to, to-wit, the 24th day of May, A. D. 1896, the said Edward Wall was engaged in the business of accompanying and caring for cattle and live stock being shipped and imported from the city of Chicago over various railroads to eastern markets, and was and had been in the employ of Nelson Morris & Company; that on or about, to-wit, the 23rd day of May, A. D. 1896, the said Edward Wall took charge of certain cars of live stock to be shipped and transported for and on behalf of the said Nelson Morris & Company, from, to-wit, the city of Chicago, in the state of Illinois, to to-wit, Newport News, in the state of Virginia, to-wit, in the county aforesaid; that said cars of live stock were to be hauled and transported by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company from the city of Chicago, aforesaid, to to-wit, the city of Cincinnati, in the state of Ohio aforesaid, to, to-wit, Newport News, in the state of Virginia, by the defendant; and the defendant did then and there undertake to and did transport over its said road from to-wit, the city of Cincinnati to, to-wit, Newport News, aforesaid, the said carloads of live stock, and it was then and there the duty of the said Edward Wall to accompany said live stock upon the said trains of the defendant, and being so in charge and control of the said carloads of live stock and caring for same, the said Edward Wall was entitled to passage over the defendant's railroad on trains conveying said live stock, and to be furnished a safe and suitable place to ride in dur-
13 ing said journey, and to be safely carried and transported on the trains of the defendant so conveying or hauling said car loads of live stock from to-wit, the city of Cincinnati, to, to-wit, Newport News, aforesaid, for a reward in that behalf.

Plaintiff further avers that when said cars of live stock and the said train upon which said Edward Wall had taken passage, arrived at the city of Cincinnati, the engine and the car or caboose provided for the said Edward Wall to ride in by the said Cleveland, Cincinnati, Chicago and St. Louis Railway Company, were detached and thereupon said cars of live stock were turned over to and taken in charge by the servants and agents of the defendant, and were attached to a locomotive engine of the defendant to be transported over the road of the defendant from the said city of Cincinnati, to the city of Newport News, aforesaid, and it then and there became and was the duty of the defendant to attach to said train a caboose or car, or other safe and suitable place in which the said Edward Wall could safely ride in order to accompany said cars of live stock, as he was in duty bound to do, and as the defendant well knew; but the said railroad company failed and neglected so to do, or to furnish other place than the top of said cars where the said Edward Wall could then and there ride in accompanying said cars of live stock through the city of Cincinnati in the state of Ohio, as aforesaid.

Plaintiff further avers that after the said cars were taken in charge by the said defendant, the tracks used by the said defendant company over which said train was being hauled, passed under certain street bridges or viaducts, in the city of Cincinnati and state

of Ohio, commonly known as, to-wit, the Fremont Street bridge or viaduct, the Sixth street bridge or viaduct, the Fifth Street bridge or viaduct, and the Third Street bridge or viaduct; that said
14 bridges or viaducts and said railroad over which said train was being hauled by the said defendant company was so constructed that not sufficient space remained between the top of said cars and said viaducts or bridges for persons on top of said cars to safely pass thereunder; that said space did not exceed, to-wit, the space of three feet; that it was well known to the defendant to be dangerous for persons to ride on the tops of cars passing under such bridges or viaducts.

Plaintiff further avers that while said train of cars was being so hauled by the defendant, and while no caboose or car was attached to said train or other place provided in which said Edward Wall could safely ride, and while he was with all due care and diligence on his part riding on top of said cars so caring for the said cars of live stock, and so performing his duty in that behalf, and not knowing the danger from said bridges or viaducts, he was struck with great force and violence by one of said bridges or viaducts under which said train was being hauled, to-wit, the Sixth Street bridge or viaduct and was thereby thrown down with great force and violence and thereby received great injuries, to-wit his back was broken and otherwise greatly injured and bruised, insomuch and by means whereof the said Edward Wall then and there died.

Plaintiff further avers that the said defendant was negligent in this, that it failed to furnish said Edward Wall a safe place in which to ride while accompanying and caring for said car loads of live stock or warn him of the danger he incurred in so riding in the place so provided for him to ride in by the said defendant, viz: the top of said cars.

Plaintiff further avers that the said injuries causing the death of the said Edward Wall, occurred in, to-wit, the city of Cin-
15 cinnati, and state of Ohio, to-wit, in the country aforesaid, and that by the statutes of the state of Ohio in force at the time of such injury it is provided among other things than whenever the death of a person shall be caused by the wrongful act or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the corporation which or person who would have been liable if death had not ensued, shall be liable for the damages notwithstanding the death of the person injured, etc.; and it is also further provided that every such action shall be for the exclusive benefit of the wife or husband and children or if there be neither of them, then of the parents and next of kin, of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person, and in every such action the jury may give damages not to exceed in any case $10,000.00, as they may think proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought.

16 Plaintiff further avers that on, to-wit, the 29th day of March, 1898, and within two years from the death of said deceased and the time said cause of action accrued, a suit was commenced in the Circuit Court of Cook County, state of Illinois by the plaintiff herein against the defendant herein for damages for injuries causing the death of said Edward Wall; that said action was removed by the defendant, the Chesapeake & Ohio Railway Company, from the Circuit Court of Cook County to the Circuit Court of The United States for the Northern District of Illinois; that after said removal the said defendant filed a motion in that court to quash the service of summons upon the said defendant, which said motion was granted by the Circuit Court of the United States for the Northern District of Illinois, and said cause was thereupon dismissed by the said court on, to-wit, the 28th day of November, A. D. 1898; thereupon the plaintiff commenced this action within one year next ensuing after the dismissal of said cause of action by the Circuit Court of the United States for the Northern District of Illinois.

Plaintiff further avers that said cause of action which was so dismissed by the Circuit Court of the United States for the Northern District of Illinois was never tried upon the merits, and that the cause of action in said suit so dismissed by the said Circuit Court of the United States is the same cause of action as is herein alleged.

Plaintiff further avers that the said Edward Wall left him surviving Sarah Mary Wall, his wife, one Edwin Wall, his son, and one Marie Wall, his daughter, who are still living; that by reason of the death of said Edward Wall, aforesaid, said Sarah Mary Wall has been deprived of her means of support, and the said Edwin Wall and Marie Wall were then and there deprived of their means of support and education.

17 And that afterwards, to-wit, on January 9th A. D. 1900, there was filed in the office of the clerk of said court a certain demurrer to the said amended declaration, which is in words and figures following:

196,233/17857.

SARAH MARY WALL, Administratrix, etc.,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY.

And the said defendant, by Remy & Mann its attorneys, comes and defends the wrong and injury when, etc. and says that the said amended declaration of the plaintiff filed herein on the 5th day of January A. D. 1900, and each and every count thereof, is insufficient in law, wherefor it prays judgment etc.

REMY & MANN,
Att'ys for Defendant.

And afterwards, to-wit, on the 12th day of January A. D. 1901, same being one of the days of the December Term, A. D. 1900 of the said court, the following among other proceedings were had in said court and entered of record, to-wit:

18 196,233. Case.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY.

This cause coming on to be heard upon demurrer to the declaration filed in said cause, after argument of counsel and due deliberation by the court, said demurrer is sustained.

Whereupon the plaintiff elects to stand by said declaration filed herein.

Therefore it is considered by the court that the defendant do have and recover of and from said plaintiff its costs and charges in this behalf expended to be paid in due course of administration.

Thereupon the plaintiff having entered her exceptions herein prays an appeal from the judgment of this court to the Appellate Court in and for the First District of Illinois, which is allowed upon the said plaintiff filing herein her appeal bond in the penal sum of One Hundred Dollars to be approved by the court within thirty days from this date.

19 At a Supreme Court Begun and Held at Springfield on Tuesday, the Second Day of December, in the Year of Our Lord One Thousand Nine Hundred and Two, within and for the State of Illinois.

Present:

Benjamin D. Magruder, Chief Justice.
Jacob W. Wilkin, Justice.
James H. Cartwright, Justice.
John P. Hand, Justice.
Joseph H. Carter, Justice.
Carroll C. Boggs, Justice.
James B. Ricks, Justice.
Howland J. Hamlin, Attorney General.
B. H. Brainerd, Sheriff.

Attest:

CHRISTOPHER MAMER,
Clerk.

Be it remembered, to-wit, on the Sixteenth day of December, A. D. 1902, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of record, to-wit:

No. 2552.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY.

Error to Appellate Court of Illinois, First District.

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and being now sufficiently advised of and concerning the premises, are of the opin-on that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid, there is Manifest Error: Therefore it is considered by the Court that for that Error, and others in the record and proceedings aforesaid, the judgment of the Appellate Court and of the Circuit Court, in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of Cook County for such other and further proceedings as to law and justice shall appertain. And it is further considered by the Court, that the said plaintiff in error recover of and from said defendant in error her costs by her in this behalf expended,
20 & 21 and that she have execution therefor:

* * * * * * *

22 And thereupon on the same day, to-wit on the 19th day of June A. D. 1917, a certain additional plea was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. 196,233.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY.

And for a further plea in this behalf, the defendant, by and through its attorney, Worth E. Caylor, says that the plaintiff ought

not to have her aforesaid action against it, the defendant, because it the said defendant, before and at the time of the committing of the said supposed grievances above laid to its charges, or any or either of them in the said declaration mentioned: did not own operate or control any railway in the City of Cincinnati and State of Ohio, and did not own, operate or control the engine, car or train of cars on which Edward Wall was riding at the time of the alleged injuries complained of, but that the alleged injuries, if any, resulting to the said Edward Wall, as complained of in the plaintiff's declaration, resulted to the said Edward Wall while said Edward Wall was riding in the City of Cincinnati, State of Ohio, on the 24th day of May A. D. 1896, on the top of a freight car under the control and operation of a railroad company, a common carrier, called "The Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company"

23 & 24 and that according to the laws of the State of Ohio, in force and effect at the time of the said supposed grievances the plaintiff cannot recover damages from or against it, the defendant, for any injury or injuries, whatsoever when such injury or injuries were not caused by it, the defendant: And this the defendant is ready to verify;

Wherefore, it prays judgment, if the plaintiff ought to have her aforesaid action against it, etc.

WORTH E. CAYLOR,
Attorney for Defendant.

And afterwards, to-wit, on the 20th day of June A. D. 1917, a certain replication was filed in the office of the Clerk of said Court in words and figures following, to-wit:

* * * * * * *

25 And afterwards, towit, on the 21st day of June A. D. 1917 the following proceedings were had and entered of record in said Court, to-wit:

June 21, 1917.

Judge Tuthill.

Case 196,233.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall Deceased,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY.

This day again come the parties to this suit by their attorneys respectively and the jury heretofore impaneled for trial of said cause also come and say: We the Jury find the defendant guilty and assess the plaintiff damages at the sum of Ten Thousand Dollars ($10,000.00).

Whereupon the defendant enters herein its motion for a new trial in said cause.

26 And afterwards, to-wit, on the 30th day of June, A. D. 1917, the following proceedings were had and entered of record in said Court, to-wit:

June 30, 1917.

Judge Tuthill.

Case 196,233.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY.

This cause coming on to be heard upon the defendant's motion heretofore entered herein for a new trial in said cause after arguments of counsel and due deliberation by the court it is ordered that said motion be overruled and a new trial denied to which ruling of the court the defendant here and now duly excepts.

Thereupon the defendant enters herein its motion in arrest of judgment which motion is also overruled and denied to which ruling of the court the defendant here and now duly excepts.

Therefore it is considered by the Court that the plaintiff do have and recover of and from the defendant her said damages of Ten Thousand Dollars ($10,000.00) in form as aforesaid by the jury assessed together with her costs and charges in this behalf expended and have execution therefor, to which ruling of the Court the defendant here and now duly excepts.

27-107 And afterwards, to-wit, on the 30th day of June, A. D. 1917, the following proceedings were had and entered of record in said Court, to-wit:

June 30, 1917.

Judge Tuthill.

Case 196,233.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY.

This cause coming on to be heard upon the defendant's motion heretofore entered herein for a new trial in said cause after arguments of counsel and due deliberation by the Court it is ordered that

said motion be overruled and a new trial denied to which ruling of the Court the defendant here and now duly excepts.

Thereupon the defendant enters herein its motion in arrest of judgment which motion is also overruled and denied to which ruling of the Court the defendant here and now duly excepts.

Therefore it is considered by the Court that the plaintiff do have and recover of and from the defendant her said damages of Ten Thousand Dollars ($10,000.00) in form as aforesaid by the jury assessed together with her costs and charges in this behalf expended and have execution therefor, to which ruling of the Court the defendant here and now duly excepts.

* * * * * * *

108 *Assignment of Errors.*

1. The Appellate Court erred in affirming the judgment of the Circuit Court of Cook County.

2. The Appellate Court erred in not reversing the judgment of the Circuit Court of Cook County and entering a judgment for appellant.

3. The Appellate Court erred in not reversing the judgment of the Circuit Court of Cook County and remanding the cause for a new trial.

4. The Appellate Court erred in not reversing the cause with a finding of facts.

5. The judgment of the Appellate Court is contrary to law.

6. The judgment of the Appellate Court is contrary to the evidence.

7. The judgment of the Appellate Court is not sustained by either the law or the evidence in the cause.

8. The Circuit Court erred in admitting incompetent and improper evidence on the part of the plaintiff.

9. The Circuit Court erred in excluding proper and competent evidence on the part of the defendant.

10. The Circuit Court erred in giving to the jury improper instructions on the part of the plaintiff.

11. The Circuit Court erred in refusing to give proper instructions asked on behalf of the defendant.

12. The Circuit Court erred in modifying the instructions of law asked on behalf of the defendant and thereafter giving them to the jury.

13. The Circuit Court erred in modifying the instructions of law asked on behalf of the plaintiff and thereafter giving them to the jury.

14. The verdict of the jury in this cause is contrary to the law and the evidence.

15. The Circuit Court erred at the close of all the evidence in overruling defendant's motion to instruct the jury to find the defendant not guilty.

109–183 16. The Circuit Court erred in making improper remarks as to the law governing the issues of the case, in the presence and hearing of the jury, without reducing the same to writing.

17. The Circuit Court erred in not instructing the jury to find the issues for the defendant because of the statute of the State of Ohio which was introduced in evidence, and which showed that to entitle the plaintiff to recover in this case action must have been begun within two years after the death of the person injured; such ruling is contrary to the Fourteenth Amendment of the Constitution of the United States and contrary to Section 1 of Article IV of the Constitution of the United States.

18. The Circuit Court erred in sustaining the demurrer filed by the plaintiff to the rejoinder of the defendant to the plaintiff's replication to the third amended plea, which order was entered on the 16th day of June, 1906.

19. The Circuit Court erred in overruling the demurrer filed by the defendant to the plaintiff's replication to defendant's second plea, which order was entered on the 27th day of January, 1906.

20. The Circuit Court erred in not sustaining the plea of the defendant, setting up the statute of limitations in the State of Ohio.

21. The Circuit Court erred in sustaining the demurrer of the plaintiff to the defendant's third plea, which order was entered on the 30th day of December, 1905.

22. The Circuit Court erred in not awarding defendant a new trial.

23. The Circuit Court erred in overruling defendant's motion in arrest of judgment.

24. The Circuit Court erred in rendering judgment against the defendant upon the verdict of the jury in said cause.

Wherefore and for other errors apparent upon the face of the record and proceedings, this petitioner prays that said judgment of the Appellate Court be reversed, or reversed and remended, and prays for such other and further order and judgment as to law and justice may appertain.

WORTH E. CAYLOR,
Attorney for Petitioner.

* * * * * * *

184–329 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Fourth Day of June, in the Year of our Lord One Thousand Nine Hundred and —, within and for the State of Illinois.

Present:

Warren W. Duncan, Chief Justice.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice George A. Cooke.
Justice William M. Farmer.
Justice Frank K. Dunn.
Justice Clyde E. Stone.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered, that afterwards, to-wit, on the 17th day of June, A. D. 1918, an order was entered of record in the words and figures following, to-wit:

12199.

SARAH MARY WALL, Adm'r'x,

vs.

CHESAPEAKE & OHIO RAILWAY CO.

Certiorari- First District.

Now on this day petition for certiorari herein is allowed and writ is ordered to issue.

* * * * * * *

Oct 11, 1918.

330 12199.

SARAH MARY WALL, Adm'r'x of the Estate of Edward Wall, Deceased, Defendant in Error,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY.

Error First District.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that Plaintiff in Error, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said Defendant in Error having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by C. Paul Tallmadge, for defendant in error, is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

331 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of October, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, within and for the State of Illinois.

Present:
Chief Justice Frank K. Dunn.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL,
Clerk.

Be it remembered, that afterward, to-wit: on the 27th day of October, 1919, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 12199.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased, Defendant in Error,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error.

Error to Appellate Court of First District.

Appeal from —.

332 Docket No. 12199. Agenda 16. October, 1918.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased, Defendant in Error,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error.

Opinion by Thompson, J.

This cause comes to this court by writ of certiorari to the Appellate Court of the First District to review a judgment of that court, affirming a judgment of the circuit court of Cook County for $10,000.00, in an action on the case instituted by Sarah Mary Wall, administratrix of the estate of Edward Wall, deceased, against the Chesapeake and Ohio Railway Company to recover damages for the death of the said Edward Wall.

This case has been in the courts for over twenty years. The first suit was filed on March 29, 1898, in the superior court of Cook county to recover damages for the death of Edward Wall, who was killed in Cincinnati, Ohio, May 24, 1896. The cause was removed to the federal courts, where the service of summons was quashed. It is reported in 95 Fed. 398. The second suit was started in the circuit court of Cook County on the 8th day of June, 1899. The declaration consisted of twelve counts and charged in general, that Edward Wall was in the employment of Nelson Morris & Company, and while in such employment was in charge of certain cars of live stock, which were being shipped from
333 Chicago to Newport News over the lines of the Big Four and the Chesapeake and Ohio Railway Companies; that it was his duty to accompany said live stock, and it was the duty of the railroad company to furnish him a safe place to ride; that at Cincinnati the engine and caboose of the train on which he was riding were detached; that an engine of the Chesapeake and Ohio Railway Company was attached to the cars by its servants, and they started

to move the cars; that the Chesapeake and Ohio Railway Company failing to provide a caboose or other safe place in which Edward Wall could ride, he rode on top of the stock cars; that the train on which Edward Wall was riding, passed under certain viaducts in the city of Cincinnati, which were so constructed that there was not sufficient space between the top of the cars and the viaducts so that persons riding on top of the cars could safely pass thereunder; that the said Edward Wall was riding with all due care and diligence on top of one of said cars, and not knowing of the danger from said viaducts, was struck by one of said viaducts and received injuries from which he died. The statute of the state of Ohio, creating the right to recover damages for death from wrongful act, was also set forth. The case was carried through the Appellate Court and this court on a question of pleading and is reported in the 101st Illinois Appellate 431 and the 200th Illinois 66. The judgment of the circuit court and the Appellate Court were reversed in this court for the reason that the defense of the Statute of Limitations can not be raised by demurrer even though the declaration upon its face shows that the time for bringing the suit has elapsed, holding that such defense must be set up by plea. The case was remanded and redocketed in the circuit court and after great delay in settling the issues the cause was in 1913 again taken to the Appellate
334 Court on a question of pleading, and reversed. It is reported in 189 Ill. App. 234. The cause was remanded and redocketed in the circuit court, and on the second trial before a jury the defendant, plaintiff in error here, at the close of all the evidence asked the court to instruct the jury to find the defendant not guilty. This motion was overruled and judgment was entered on the verdict of the jury for the sum of $10,000. Motions for a new trial and in arrest of judgment were made and overruled. On appeal to the Appellate Court this judgment was affirmed and the cause is brought here by certiorari.

Many errors are relied upon for a reversal, but the first point we shall determine is, whether or not the courts of Illinois have jurisdiction of this cause of action. It is a rule of law well settled in this State, that a right of action which has accrued under a statute of a sister state of this Union will be enforced in the courts of this State, unless prohibited by law, or unless it is against morals or natural justice, or unless it is against the general interests of the citizens of this State. Chicago and Eastern Illinois R. R. Co. v. Rouse, 178 Ill. 132; Dougherty v. American McKenna Process Co. 255 id. 369. The statutes of Ohio, set out in this declaration are not regarded in this State as against morals or natural justice, or hostile to the general interests of our citizens. Therefore, they must be enforced by our courts, unless such enforcement is prohibited by law.

Section 2 of the Injuries act, (Hurd Stat. 1917, p. 1662), was amended in 1903 and by said amendment it was declared that "no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State." If these words be given their natural or ordinary meaning, they expressly prohibit the

bringing or the prosecution of the present action in the courts
335 of this State. Our injuries act has never given to any person a right of action for a death by wrongful act occur-ing outside this State. Our statute has no extra-territorial force. The right of action in this case arose under the Ohio statute, and as we have said, the rights acquired under that statute will, in comity, be enforced in our courts, if not against our laws. The law of the place where the right was acquired or the liabilty was incurred will govern as to hte right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought, i. e., by the law of this State. Chicago and Eastern Illinois R. R. Co. v. Rouse, supra; Dougherty v. American McKenna Process Co., Supra.

Inasmuch, therefore, as our Injuries act never gave a right of action for death by wrongful act occur-ing in another state, the only interpretation we can put upon the words quoted from the act is that it was intended by the legislature to forbid the bringing or the prosecution of any action in this State to recover damages for a death by wrongful act occur-ing outside this State. Each state, subject to restrictions of the Federal Constitution, determines the limits of jurisdiction of its courts, the character of the controversies which shall be heard in them, and how far its courts, having jurisdiction of the parties, shall hear and decide transitory actions where the cause of action has arisen outside of the State. Different States may have different policies and the same State may have different policies at different times, provided that any policy the State may choose to adopt must operate the same way on its own citizens and those of other states. Dougherty v. American McKenna Process Co., supra; Walton v. Pryor, 276 Ill. 563; Kenney v. Loyal Order of Moose, 285 id. 188.

Our injuries act confers jurisdiction upon our courts in cases resulting in death by wrongful act, which they did not have before it
336 was given them by the legislature. By the amendment of 1903 the legislature took this jurisdiction from our courts in so far as the authority conferred by the act of 1853 had enabled them, by comity, to entertain suits for the recovery of damages for a death by wrongful act occurring outside of this State. The Injuries act of 1853 gave no vested right to anyone interested in recovering damages for a death by wrongful act occur-ing outside of the State. The plaintiff had no vested right in the statute of 1853, and the legislature could have, had it seen fit, entirely repealed this statute and thereby swept away the entire remedy provided by it. There is no vested right in a public law which is not in the nature of a private grant. However beneficial an act of the legislature may be to a particular person or however injuriously its repeal may affect him, the legislature would clearly have the right to abrogate it. Sharp v. Sharp, 213 Ill. 332.

It is well settled, that if a statute, giving a special remedy, is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it can not be after. If a

case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered. The effect of the repeal of a statute is to obliterate the statute repealed as completely as if it had never been passed, and it must be considered as a law that never existed, except for the purposes of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. Pending judicial proceedings based upon a statute can not proceed after its repeal. This rule holds true until the proceedings have reached a final judgment in the court of last resort; for that court, when it comes to pronounce its decision, conforms it to the law then existing,
and may, therefore, reverse a judgment which was correct
337 when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal, a statute which was necessary to support the judgment of the lower court, has been withdrawn by an absolute repeal. Vance v. Rankin, 194 Ill. 625, and cases there cited.

The proviso of 1903 added to our Injuries act, had the same effect as the repeal of a statute. In other words, the Injuries act before this proviso, was broad enough to confer jurisdiction on our courts in any action for the recovery of damages for death by wrongful act, and, by comity, this jurisdiction was extended to those cases where death by wrongful act occurred outside of our State and a right of action existed under the laws of the State where the death occurred. Our courts then provided the remedy. This proviso took away that remedy in 1903 and it no longer exists in this State. Crane v. Chicago Western Indiana R. R. Co., 233 Ill. 259. The effect is the same as if the remedy never existed in this State, except for the purpose of those suits which have reached a final judgment.

The result is all the more clear when we consider that the act specifically prohibits the prosecution of the suit as well as the bringing of the suit. To prosecute a suit is to proceed against a party judicially. It is the act of conducting or waging a proceeding in court; State v. District Court, 19 N. D. 819, 124 N. W. 417. To prosecute an action includes not only the bringing, but the carrying on of the action. Inhabitants of Great Barrington v. Gibbons, 199 Mass. 527, 85 N. E. 737; Cheshire v. Des Moines City Ry. Co. 153 Ia. 88, 133 N. W. 324. The term prosecute means to bring a suit in a court for the redress of a wrong; to carry on a judicial proceeding against another, or to seek to enforce a claim or right by legal process. Western Electric Co. v. Pickett, 51 Col. 415, 118 Pac. 988.

338 The bringing of an action is the beginning of a suit; the prosecution of the action is the further conduct of the suit. Whenever the legislature declares that no action shall be "brought" or "prosecuted," it is presumed that it intended each phrase to have its distinct meaning, else there was no occasion to use both. Buecker v. Carr, 60 N. J. Eq. 300, 47 Atl. 34.

Plaintiff had no vested right in this proceeding when it was instituted in the lower court with the full knowledge that it was within the power of the legislature to declare that no such actions could be maintained in this State. There can be no vested right in the claim

for damages in a tort not connected with or growing out of a con tractual relation until judgment is rendered. 12 C. J. 972. Inas much as the plaintiff had no vested right in the broad jurisdictio conferred upon our courts by the act of 1853, and inasmuch as ou legislature has declared that our courts can not longer entertain cause of action for the recovery of damages for a death by wrongfu act occurring outside of this state, the peremptory instruction re quested by the defendant should have been given.

For the reason that the further prosecution of this cause of actio is prohibited by the law of this State, the judgment of the circu court and the Appellate Court are reversed.

Judgments reversed.

Dunn, C. J., and Carter and Stone J. J., dissenting.

339 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfiel on Tuesday, the Seventh Day of October, in the Year of Our Lor One Thousand Nine Hundred and Nineteen, within and for th State of Illinois.

Present—

Chief Justice Frank K. Dunn.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it Remembered, that, to-wit: on the 27th day of Octobe A. D. 1919, the same being one of the days of the said Octob term of said Supreme Court, certain proceedings were had in sa Court and entered of record in the words and figures following, t wit:

No. 12199.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased, Defendant in Error,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error.

Appeal from —.

Error to Appellate Court of First District.

October 27th A. D., 1919.

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now, being sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the judgments aforesaid, there is Manifest Error: Therefore, it is considered by the Court that for that Error and others in the record and proceedings aforesaid, the judgments of the Appellate Court and of the Circuit Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed.

And it is further considered by the Court that the said Plaintiff in Error recover of and from the said Defendant in Error its costs by it in this behalf expended, to be taxed, in due course of administration.

340 In the Supreme Court of Illinois, October Term, A. D., 1919.

No. 12199.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation.

Certiorari to Appellate Court, First District.

Petition for Rehearing.

Bulkley, More & Tallmadge, Attorneys for Petitioner.

Filed Nov. 13, 1919. Chas. W. Vail, Clerk of Supreme Court.

341 In the Supreme Court of Illinois, October Term, A. D., 1919.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation.

Certiorari to Appellate Court, First District.

Petition for Rehearing.

Now comes Sarah Mary Wall, administratrix, and respectfully petitions the court to grant a rehearing in the above entitled cause for the reasons set forth in the suggestions hereto subjoined.

BULKLEY, MORE & TALLMADGE,
Attorneys for Defendant in Error.

I.

The court has overlooked the fact that as a question of federal constitutional law it is now definitely settled that the whole theory of the decision is erroneous.

After a cause of action has already accrued even though
342 it be a statutory cause of action no state can withdraw the remedy forthwith, without reasonable provision for pending actions, without violating the 14th Amendment, Section I of U. S. Constitution.

Ettor v. City of Tacoma, 228 U. S. 148.

II.

The opinion is illogical. It is based upon the theory that although the cause of action predicated upon the Ohio statute is sound, nevertheless the Illinois courts will not extend a remedy and then illogically says that the peremptory instruction to find the defendant not guilty on the issues joined, should have been given. Said instruction would be a finding on the merits res adjudicata upon the plaintiff in every Anglo-Saxon court. It is rank error to hold the court has no jurisdiction to hear and determine the case and at the same time assume jurisdiction and direct a finding against the plaintiff on the merits binding upon her in every court forever.

III.

The decision if allowed to stand, after twenty years of litigation, disposes of the case upon a single ground not raised by any assignment of error and therefore in violation of the rules of this court.

IV.

The decision enters into a learned discussion of vested rights and rights not vested (a doctrine not disputed by the plaintiff),
343 but utterly overlooks and ignores entirely section 4 of the Statutory Construction Act which directly decides the precise point in controversy.

V.

The effect of the decision is to hold invalid and nugatory section 4 of the Statutory Construction Act, a section that has been upheld and in force in this state for no less than forty-five years.

VI.

Section 4 of the Statutory Construction Act, Hurd's Revised Statutes 1917, Chapter 131, Section 4, page 2846, provides:

"No new law shall be construed to repeal a former law as to any act done * * * any right accrued, or claim arising under the former law * * * or in any way to affect any act done or any right accrued, or claim arising before the new law takes effect."

The only purpose of said section was to protect rights and claims not vested. Vested rights needed no protection. They constitute property and cannot be taken without due process of law and just compensation therefor. The legislature has no power to destroy vested rights. The sole and only purpose of section 4 of the Statutory Construction Act was to protect rights and claims not vested, just such rights and claims as the one in question.

344 VII.

The court's citation, Sharp v. Sharp, 213 Ill. 332, is not in point. There the complainant still had three months left in which to sue. She was not absolutely foreclosed as here (see page 337).

The court has misapprehended Vance v. Rankin, 194 Ill. 625. No authority in point is or can be cited upon the vital point of the court's decision. The case cited in the decision namely Vance v. Rankin, 194 Ill. 625, is not in point at all. In that case the legislative act repealing the former law specifically provided:

"It shall apply to and affect all cases whether application has been made for disconnection or not."

Therefore by its own terms it specifically applied to pending cases in which the application had already been made. No question of how it should be construed was involved.

Necessarily the only question which was or could be involved in that case was whether the legislature had the power to pass such an act, a proposition to which this court devotes almost its entire atten-

tion in its opinion. The question here and the only question is whether a statute which does not by its terms specifically provide that it should be retroactive and apply to cases heretofore brought and pending, shall nevertheless be construed to so apply in spite of section 4 of the Statutory Construction Act, which says that it shall never be so construed.

345 VIII.

The decision falls into the very error this court condemned in Merlo v. Coal & Mining Company, 258 Ill., at page 335 to page 339, and People v. Zito, 237 Ill. at page 439. The decision overrules Merlo v. Coal & Mining Company, 258 Ill. 328; People v. Zito, 237 Ill. 423, and sections 2 and 4 of the Statutory Construction Act. We respectfully exhort the court to read these two cases which must have been overlooked.

IX.

After more than two decades of litigation, as a matter of fairness to the plaintiff, she is at least entitled to have a decision by the court of last resort which meets the issue squarely and puts itself upon record as either holding or not holding that the 1903 proviso of the Injuries Act will be construed as retroactive and be applied to pending cases, sections 2 and 4 of the Statutory Construction Act to the contrary notwithstanding.

X.

Why is it that sections 2 and 4 of the Statutory Construction Act, an act passed to formulate a rule of construction for just such questions as this, are not even cited or mentioned in the opinion?

346 XI.

The 1903 proviso should be construed viz:

"No action shall be brought and prosecuted in this state to recover damages for death occurring out of this state."

The decisions construing or to be and are so numerous in this state and elsewhere that their name is legion.

Smith v. Dillitt, 239 Ill. 113.
Boyles v. McMurphy, 55 Ill. 236.
Kindig's Executors v. Smith's Administrators, 39 Ill. 300.
Olcott v. Tope, 213 Ill. 124.
Randson v. Rutherford Company, 123 Tenn. 1, also 130 S. W. 1057.
Kennedy v. Haskell, 67 Kan. 612, 73 Pac. 913.
Geo. D. Harter Bank v. Straus, 170 Fed. 489.
People v. Rice, 138 N. Y. 151.
State v. Long, 238 Mo. 383, 141 S. W. 1099.

"The popular use of or and and is so loose and so frequently inaccurate that it has affected statutory enactments. While they are not treated as interchangeable and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words and one read in the place of the other in deference to the meaning of the context."

Geiger v. Kobilka, 26 Wash. 171.

James (Auditor) v. U. S. Fidelity & Casualty Company, 133 Ky. 299, 117 S. W. 406.

347 Sutherland on Statutory Construction, section 252:

"And and or are convertible as the sense of the statute may require, even in a criminal statute."

Williams v. State, 99 Ark. 149, 137 S. W. 927.

Pomeroy's notes to Sedgwick on Construction of Statutes, page 371.

Vol. 2 Lewis' Sutherland Statutory Construction, section 397.

XII.

The decision construing the 1903 proviso of the Injuries Act as it does, applied to this case contravenes and violates article 4, section 1, of the Constitution of the United States (the so-called full faith and credit clause). The Illinois courts cannot assume jurisdiction of a cause of action arising upon a valid existing statute of a sister state, hold the same until outlawed elsewhere, then abandon it remediless and thereby satisfy the full faith and credit clause of the Federal Constitution. A construction of the 1903 proviso should not be indulged in which makes it operate as a fraud and thereby unconstitutional. Both the principle and the reasoning is analogous in the cases where states have cut off rights thus protected by the Federal constitution by unreasonable limitation acts.

"The power to enact such statutes is subject to the fundamental condition that a reasonable time must be given for the exercise of the right of action, whether existing or prospective after it comes
348 within the prospective or present operation of the statute and before the bar becomes effective."

Lamb v. Powder River Stock Company, 132 Fed. 434.

"The general rule is conceded, but it is always conditioned by the proviso that such statutes must allow a reasonable time to enforce rights of action in the state of their enactment, that they may not lawfully strike down the right of action by destroying or denying all rights of remedy for its enforcement, and that they may not repeal or nullify the provisions of the constitution of the United States and of the act of congress which have been quoted. The law of Colorado is not a statute of limitations, it is a statute of nullification and prohibition."

Edwards v. Kearzey, 96 U. S. 595.

McGahey v. Virginia, 135 U. S. 662, at page 693.

XIII.

The decision destroys itself by its own reasoning. The court has overlooked the important fact that the Illinois Legislature had not the power to take away the rights arising under the Ohio statute. Right here is where its reasoning breaks down. The decision says:

"The Injuries Act of 1853 gave no vested right to anyone interested in recovering damages for death by wrongful act occurring outside of the state. The plaintiff has no vested rights under the statute of 1853 and the Legislature could have, had it seen fit, entirely repealed this statute and thereby wiped away the entire remedy provided by it."

The court overlooks the fact that the plaintiff here is in the
349 position of having a vested right based on the Ohio statute, a statute today still in full force and effect. Neither the Illinois Legislature nor the Illinois courts have the power to wipe away this right of action. In view of article 4, section 1, of the Federal Constitution, the Illinois courts cannot destroy this right of action based upon the Ohio statute under the pretext of withdrawing a remedy which it has assumed to extend after the remedy has been embraced. The whole decision is based on the erroneous theory that the authorities in this state could have destroyed the right itself before it ripened into a judgment.

XIV.

In the construction of a statute its ordinary and reasonable meaning should not be so distorted into an unnatural and impractical construction such as would tend to bring the administration of justice into disrepute and the courts into disfavor, by establishing a doctrine tricking and entrapping a litigant who had taken her cause to them in good faith.

XV.

The recital of the history of the case is not even correct or accurate. It says: "The cause was in 1913 again taken to the Appellate Court on a question of pleading." This is not true. It was then taken to the Appellate Court to reverse a judgment upon a verdict for the plaintiff in the sum of $6,000.

350 XVI.

The decision of this court placing the construction it does upon the 1903 proviso of the Illinois Injuries Act as applied to this case contravenes and violates section 1 of the 14th Amendment of the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty or property without due process of law," because the valid existing cause of action on the Ohio statute, which statute has never been abrogated, but is still in

full force and effect, constituted an inchoate property right which only the properly constituted authorities in Ohio could destroy or repeal. Neither the Legislature of another state nor the courts of another state, nor the two acting jointly, could under the pretext of a remedy so manipulate that remedy by offering and extending it and then when too late to go elsewhere, suddenly withdraw it and thereby destroy the right itself under the guise of dealing only with the remedy.

XVII.

We are past the point of considering whether the plaintiff has a vested right or a right not vested. Of course, it is vested, for the simple reason that the Ohio Legislature kept the statute in force up to and including the time when the decision was handed down in this case in this court. It may be true that an Illinois Legislature can destroy an Illinois right by repealing the statute which created it and therefore may likewise indirectly destroy it by destroy-
351 ing the remedy, but the position is utterly unsustainable that because an Ohio Legislature may likewise destroy an Ohio right by repealing the law itself that therefore an Illinois Legislature may destroy an Ohio right by its manipulation of the remedy. The whole difficulty arises from an erroneous and improper construction of the 1903 proviso.

Respectfully submitted,
BULKLEY, MORE & TALLMADGE,
Attorneys for Sarah Mary Wall, Administratrix, etc., Petitioner.

352-360 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court begun and held at Springfield on Tuesday, the second day of December, in the year of our Lord one thousand nine hundred and nineteen, within and for the State of Illinois.

Present:

Frank K. Dunn, Chief Justice.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered that afterwards, to-wit, on the 5th day of December, 1919, an order denying petition for rehearing was entered of record in the words and figures following, to-wit:

No. 12199.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased, Defendant in Error,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error.

Error to Appellate Court, First District.

Now on this day the court having duly considered petition for rehearing filed herein and the court being now advised in the premises, doth overrule the prayer of the petition and denies a rehearing of this cause.

361 Be it remembered, that on the 8th day of January, A. D. 1920, there was duly filed by plaintiff in error, Sarah Mary Wall, admrx. etc., in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois, addressed to the Hon. Frank K. Dunn, Chief Justice of the Supreme Court of Illinois, with the endorsement by the said Chief Justice upon the said petition allowing said writ of error, which documents are in words and figures as follows, to-wit:

362 [Stamped:]

Filed Jan. 8, '20. Chas. W. Vail, Clerk Supreme Court.

UNITED STATES OF AMERICA,
State of Illinois, ss:

SARAH MARY WALL, Admiaistratrix of the Estate of Edward Wall, Deceased, Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

To the Honorable Frank K. Dunn, Chief Justice of the Supreme Court of Illinois:

The petition of Sarah Mary Wall, administratrix of the estate of Edward Wall, deceased, respectfully shows that on the 27th day of October, 1919, the Supreme Court of the State of Illinois rendered

a final judgment against your petitioner in a certain cause wherein your petitioner was plaintiff and Chesapeake & Ohio Railway Company was defendant, reversing a judgment of the Circuit Court of Cook County, Illinois, for the sum of Ten Thousand Dollars, and awarded execution against your petitioner for costs; that on December 5th, 1919, said court denied to your petitioner a rehearing of said cause as will appear by reference to the record and proceedings in said cause, and that said court is the highest court of said state in which a decision in said action could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by Writ of Error under Section 237 of the Judicial Code of the United States as amended, 39 Statutes at Large 726, because there is drawn in question the validity of a statute of or an authority exercised under the State of Illinois, on the ground of their being repugnant to the con-
363 stitution or laws of the United States, and the decision is in favor of their validity.

Wherefore, your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and an order fixing the amount of bond for costs.

ALMON W. BULKLEY,
C. E. MORE,
C. PAUL TALLMADGE,
Attorneys for Petitioner.

364 In the Supreme Court of Illinois.

No. 12199.

SARAH MARY WALL, Administratrix, etc., Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Assignment of Errors.

Now comes the above petitioner and files herewith her petition for a Writ of Error, and says that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Illinois in the above entitled matter there is manifest error in this, to-wit:

The Supreme Court of Illinois erred in holding and deciding that the proviso to Section 2 of the Act entitled: "An Act to amend Section 2 of an Act entitled 'An Act requiring compensation for causing death by wrongful act, neglect or default,'" approved May 13, 1903, in force July 1, 1903, applied to all causes of action previously accrued and upon which actions at law had been brought and were pending, which proviso is in words following, to-wit:

"Provided further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State," * * *.

The validity of said statute as construed by the Supreme Court of Illinois and applied to this case was drawn in question on the ground of its being repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 1 of Article 4 of the Constitution of the United States, and the decision of the Supreme Court of Illinois was in favor of its validity.

The said errors are more particularly set forth as follows:

365 The Supreme Court of Illinois erred in that it did not hold or decide said proviso of said Act to be void for the reason that

(1) Said Act (the last proviso thereof) as construed, interpreted and applied by the Supreme Court of Illinois violated Section 1 of Article 4 of the United States Constitution.

(2) Said Act (the last proviso thereof) as construed and applied by the Supreme Court of Illinois violated the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprived the defendant in error of property without due process of law.

(3) Said Act (the last proviso thereof) as construed and applied by the Supreme Court of Illinois did not give full faith and credit to the public acts of every other state as guaranteed by Section 1 of Article 4 of the constitution of the United States.

(4) Said Act (the last proviso thereof) as construed and applied by the Supreme Court of Illinois did abridge the privileges and immunities of the petitioner as guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution.

ALMON W. BULKLEY,
C. E. MORE,
C. PAUL TALLMADGE,
Attorneys for Petitioner.

STATE OF ILLINOIS,
Supreme Court, ss:

Let a Writ of Error issue upon the execution of a bond for costs by Sarah Mary Wall, Administratrix of the Estate of Edward Wall, deceased, to Chesapeake & Ohio Railway Company in the sum of $200.00.

Dated Charleston, Ill., Jan. 5, 1920.

FRANK H. DUNN,
Chief Justice.

365½ [Endorsed:] No. 12199. In the Supreme Court of Illinois. Sarah Mary Wall vs. Chesapeake & Ohio Railway Company. Petition for Writ of Error and Assignment of Errors. Filed Jan 8, '20. Chas. W. Vail, Clerk Supreme Court. Bulkley, More & Tallmadge, 517 Home Insurance Bldg., Chicago.

366 Be it remembered, that on the 10th day of January, A. D. 1920, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Sarah Mary Wall, administratrix, etc., plaintiff in error, an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois, a copy of which Bond is in the words and figures following, to-wit:

367 [Stamped:] Filed Jan. 10, 1920. Chas. W. Vail, Clerk of Supreme Court.

In the Supreme Court of Illinois.

No. 12199.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased, Plaintiff in Error,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant in Error.

Bond for Costs.

KNOW all men by these presents, that we Sarah Mary Wall, Administratrix of the Estate of Edward Wall, Deceased, as Principal, and Almon W. Bulkley, of Chicago, Cook County, Illinois, as surety, are held and firmly bound unto Chesapeake & Ohio Railway Company in the sum of Two Hundred ($200.00) Dollars, to be paid to the said Chesapeake & Ohio Railway Company, for which payment well and truly to be made we bind ourselves jointly, severally and firmly by these presents.

Sealed with our seals and dated this 7th day of January, A. D. 1920.

Whereas, the above named plaintiff in error seeks to prosecute her Writ of Error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Illinois;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute her Writ of Error to effect and answer all costs and damages that may be adjudged if she shall fail to make good her plea, then this obligation to be void, otherwise to remain in full force and virtue.

SARAH MARY WALL, [SEAL.]
Administratrix of the Estate of Edward Wall, Deceased.
ALMON W. BULKLEY. [SEAL.]

Approved:
FRANK K. DUNN,
Chief Justice Supreme Court of Illinois.

368-371 Be it remembered, that on the 14th day of January, A. D. 1920, there was duly filed in the office of the Clerk

of the Supreme Court of Illinois, an original writ of error which is hereby attached and is in words and figures following, to-wit:

* * * * * * *

372 And afterwards, to-wit, on the 17th day of January, A. D. 1920, a certain Citation showing service on defendant in error was filed in my office, which Citation is in the words and figures following, to-wit:

373 UNITED STATES OF AMERICA, *ss:*

To Chesapeake & Ohio Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of Illinois, wherein Sarah Mary Wall, Administratrix of the Estate of Edward Wall, Deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said Writ of Error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank K. Dunn, Chief Justice of the Supreme Court of Illinois, this 5th day of January, A. D. 1920.

FRANK K. DUNN, [SEAL.]
Chief Justice of the Supreme Court of Illinois.

Room 501, No. 69 W. Washington St.,
Chicago, Illinois, January 15th, 1920.

I, the attorney of record for the defendant in error in the above entitled cause hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

WORTH E. CAYLOR,
Attorney for Defendant in Error.

373½ & 374 [Endorsed:] United States of America. Sarah Mary Wall, Admr., vs. Chesapeake & Ohio Railway Company. Citation. Filed Jan. 17, '20. Chas. W. Vail, Clerk Supreme Court. Bulkley, More & Tallmadge, 517 Home Insurance Bldg., Chicago.

* * * * * * *

375 In the Supreme Court of the United States, October Term, 1919.

No. 705.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased, Plaintiff in Error,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant in Error.

Now comes plaintiff in error, by her attorneys, and makes the following statement of the points upon which she intends to rely, together with the parts of the record which she thinks necessary for the consideration thereof.

Statement of Points.

I.

The Amendment, which went into force July 1st, 1903, to Section 2 of the Illinois Statute, which Amendment was:

"Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state."

as construed and applied in this case so as to destroy the right of action given by and arising under the public acts of a sister state, and upon which the cause of action was pending in the Illinois Courts, is unconstitutional and void.

II.

Neither the Illinois legislature nor the Illinois courts had the power to destroy the right of action created by and arising under the laws of Ohio and therefore could not accomplish such result indirectly by taking jurisdiction and later, after the cause of action was outlawed elsewhere, forbid its further prosecution in Illinois. The Illinois statute so construed to permit the effective destruction of the cause of action arising under the public acts of another state by such manipulation of the remedy is obnoxious both to
376 Section 1 Article IV and Section 1 of the XIV Amendment to the Constitution of the United States.

III.

While the Full Faith and Credit Clause of the United States Constitution does not require the courts of one state to take jurisdiction of a cause of action arising under the public acts or laws of another

state which are contrary to its public policy, nevertheless if such state takes jurisdiction and assumes to act, the Full Faith and Credit Clause requires it to act fairly and administer justice. It must either not assume jurisdiction at all, or administer justice if it chooses to take jurisdiction. It cannot take jurisdiction merely as a trap and hold the cause of action until outlawed elsewhere and thereafter abandon the jurisdiction, which it voluntarily assumed to the complete destruction of the cause of action, and thereby satisfy the Full Faith and Credit Clause of the United States Constitution.

IV.

The right of action upon which the proceeding was prosecuted in Illinois was predicated upon the statutes of Ohio and therefore constituted a vested right in the plaintiff because the laws of Ohio creating the right of action remained in force throughout and were not repealed.

Therefore the decision of the Illinois Supreme Court in 1919 construing the Illinois statute as an abandonment of jurisdiction at that date, violated Section 1 of the Fourteenth Amendment to the United States constitution, in that the State of Illinois deprived the plaintiff of property without due process of law.

V.

The legislature of one state cannot destroy a right of action created by the legislature of another state.

VI.

The destruction of a vested right by the removal of all remedy contravenes Section 1 of the Fourteenth Amendment to the
377 United States Constitution. The Illinois courts pursuant to the settled policy of the state then existing took jurisdiction of a cause of action arising under the laws of Ohio and retained jurisdiction until they possessed, controlled and constituted the sole and only remedy, and then and not until then abolished that remedy. A state which is powerless even to impair a given right cannot completely destroy it by manipulation of the remedy.

Statement of Parts of the Record Necessary for the Consideration of the Points Involved.

1. Præcipe, filed June 8th, 1899.

2. Amended declaration filed January 5th, 1900.

3. Demurrer to amended declaration filed January 9th, 1900.

4. Order of Circuit Court sustaining demurrer and allowing appeal, entered January 5th, 1901.

5. Mandate of Supreme Court, filed January 6th, 1903, reversing Appellate and Circuit Courts.

6. Verdict of June 21st, 1917.

7. Judgment order of June 30th, 1917.

8. Section 6134, General Laws of Ohio.

9. Section 6135, General Laws of Ohio.

10. Section 4991, Laws of Ohio.

11. Assignment of Errors of Chesapeake & Ohio Railway Company, Defendant in error, in the Supreme Court of Illinois.

12. Order of Supreme Court of Illinois of October 11th, 1918, taking cause under advisement.

13. Order of Supreme Court of Illinois of October 27th, 1919, reversing judgment.

14. Opinion of Supreme Court filed October 27th, 1919.

15. Petition for rehearing filed November 13th, 1919.

16. Order of Supreme Court of Illinois denying petition for rehearing, December 5th, 1919.

17. Petition for writ of error, assignment of errors, and order allowing writ of error in the Supreme Court of the United States.

18. Bond for writ of error and order approving bond.

19. Citation and service of citation.

ALMON W. BULKLEY,
CLAIR E. MORE,
C. PAUL TALLMADGE,
Attorneys for Sarah Mary Wall, Adm'r'x, etc., Plaintiff in Error.

Received a copy of the foregoing this 6th day of February A. D. 1920.

WORTH E. CAYLOR,
Attorney for Defendant in Error.

378 [Endorsed:] No. 705. U. S. Supreme Court. Sarah Mary Wall, Adm't'x, etc., Pl'ff in Error, vs. C. & O. Ry. Co., D'f't in Error. Statement of Points relied on and parts of record necessary. Bulkley, More & Tallmadge, 517 Home Insurance Bldg., Chicago. 705/27460.

379 [Endorsed:] File No. 27,460. Supreme Court U. S., October Term, 1919. Term No. 705. Sarah Mary Wall, Adm'x, etc., Pl'ff in Error, vs. Chesapeake & Ohio Railway Co.

Statement of points to be relied upon and designation by plaintiff in error of parts of the record to be printed, with proof of service of same. Filed February 10, 1920.

380 In the Supreme Court of the United States, October Term, 1919.

No. 705.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, Deceased, Plaintiff in Error,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant in Error.

Now comes the defendant in error, by its attorney, and states the points on which it relies and the additional parts of the record which are material for the consideration thereof.

Points Upon Which the Defendant in Error Relies.

I.

The alleged federal or constitutional questions upon which the plaintiff in error states she intends to rely were not raised when the case was heard in the Supreme Court of the State of Illinois, nor were they raised in any other court in the State of Illinois.

II.

The alleged federal or constitutional questions upon which the plaintiff in error states she intends to rely were not considered by the Supreme Court of the State of Illinois, or in any other court in the State of Illinois, in determining the issues of the said cause.

III.

381 It is too late for the plaintiff in error to raise a federal or constitutional question for the first time in her petition for rehearing, filed in the Supreme Court of the State of Illinois, after the final judgment of said Supreme Court of the State of Illinois.

IV.

The alleged federal or consti-tional questions upon which the plaintiff in error states she intends to rely are frivolous.

V.

The decision and judgment of the Supreme Court of the State of Illinois against the plaintiff in error are not contrary to the constitution and laws of the United States.

VI.

The cause of action brought by the plaintiff in error in the Circuit Court of Cook County, Illinois, having been begun after the time prescribed by the statutes of the State of Ohio, can not be maintained, because such action was not brought within the time fixed as a condition of liability.

VII.

The general statutes of limitations of both the states of Ohio and Illinois allowing additional time to begin a similar suit, a suit based upon the same facts having been instituted by the plaintiff in error in the Superior Court of Cook County and theretofore dismissed, are not statutes affecting in any way a statutory action for death caused by wrongful act.

VIII.

The plaintiff in error having consented to the dismissal of her cause of action instituted in the Superior Court of Cook County, can not avail herself of the statutes of limitations of the State of Illinois extending a right to begin a similar action one year from the date of such dismissal.

382 IX.

The prosecution of this cause of action by plaintiff in error is prohibited by the statutes of the State of Illinois.

X.

The defendant in error is not liable for the reason that it did not own, operate, or control the tracks or train over and upon which the deceased husband of the plaintiff in error was riding at the time he met with the injury complained of.

XI.

The giving and refusing of certain instructions by the presiding judge of the Circuit Court of Cook County, at the trial of the cause, were erroneous and constituted error on the part of the court.

XII.

The undisputed evidence is that the deceased husband of the plaintiff in error was guilty of contributory negligence and that the defendant in error was guilty of no negligence and therefore plaintiff in error ought not to recover.

Statement of Additional Parts of the Record Necessary for the Consideration of the Points Involved.

1. Special plea of defendant, filed June 20, 1917.

2. Order denying motion for new trial and motion in arrest of judgment.

3. Bill of exceptions, including certificate and signature of judge.

4. Order of Supreme Court of Illinois allowing petition for writ of certiorari.

5. Brief and argument for plaintiff in error, Chesapeake & Ohio Railway Company, in Supreme Court of Illinois.

6. Brief and argument for defendant in error, Sarah Mary Wall, Administratrix, etc., in Supreme Court of Illinois.

383 7. Reply brief and argument for plaintiff in error, Chesapeake & Ohio Railway Company, in Supreme Court of Illinois.

WORTH E. CAYLOR,
Attorney for Chesapeake & Ohio Railway Company, Defendant in Error.

Received a copy of the above statement this 11th day of February, A. D. 1920.

ALMON W. BULKLEY,
CLAIR E. MORE,
C. PAUL TALLMADGE,
Attorneys for Plaintiff in Error.

384 [Endorsed:] Number 705. Supreme Court of United States. Sarah Mary Wall, Administratrix, etc., Plaintiff in Error, vs. Chesapeake & Ohio Railway Company, Defendant in Error. Worth E. Caylor, Attorney at Law, 69 West Washington Street. 705/27460.

385 [Endorsed:] File No. 27,460. Supreme Court U. S. October Term, 1919. Term No. 705. Sarah Mary Wall, Adm'x etc., Pl'ff in Error, vs. Chesapeake & Ohio Railway Co. Designation by defendant in error of parts of record to be printed. Filed March 4, 1920.

Endorsed on cover: File No. 27,460. Illinois Supreme Court. Term No. 237. Sarah Mary Wall, administratrix of the estate of Edward Wall, deceased, plaintiff in error, vs. Chesapeake & Ohio Railway Company. Filed February 2, 1920. File No. 27,460.

Office Supreme Court, U. S.
FEB 10 1920
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1919.

No. 705. 237

SARAH MARY WALL, administratrix of the estate of Edward Wall, *Plaintiff in Error.* vs. CHESAPEAKE & OHIO RAILWAY COMPANY, *Defendant in Error.*	Writ of Error to Supreme Court of Illinois.

MOTION.

ALMON W. BULKLEY,
C. E. MORE,
C. PAUL TALLMADGE,
Attorneys for Plaintiff in Error.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1919.

No. 705.

SARAH MARY WALL, administratrix of the estate of Edward Wall, *Plaintiff in Error,* vs. CHESAPEAKE & OHIO RAILWAY COMPANY, *Defendant in Error.*	Writ of Error to Supreme Court of Illinois.

MOTION.

Now comes Sarah Mary Wall, plaintiff in error, by her attorneys, and moves the court:

(1) That there be stricken from the record the brief and argument of the Chesapeake & Ohio Railway Company as plaintiff in error in the Supreme Court of Illinois, brief and argument of Sarah Mary Wall as defendant in error in the Supreme Court of Illinois, and the reply brief and argument of the said Chesapeake & Ohio Railway Company in the Supreme Court of Illinois, and that the clerk of this court be directed to omit the same from the printed record for the reason that they are not a proper part of the record and were improperly incorporated in the transcript and as designated by the defendant in

error in this court to be printed here as a part of the record aggregate 142 pages, and improperly encumber the record.

Zadig v. *Baldwin*, 166 U. S. 485.
Sayward v. *Denny*, 158 U. S. 180.

(II) And the plaintiff in error further moves that the clerk of this court be instructed to omit from the printed record the bill of exceptions for the reason,

(a) That it is unnecessary for the proper consideration of the case in this court. Said bill of exceptions contains all the evidence of the case in the jury trial, including the testimony of twelve (12) witnesses on the question of the defendant's negligence, the plaintiff's contributory negligence, the ownership of the instrumentalities causing the death, the agency of the train crew and other controverted questions of fact passed upon by the jury, and not even remotely affecting the single question upon which the case is brought to this court, to wit: whether the 1903 proviso to the Illinois Statute, as construed and applied to this case, is repugnant to the Federal Constitution, and

(b) For the further reason that when this case reached the Supreme Court of Illinois the last time, the plaintiff had a verdict and judgment for ten thousand dollars ($10,000). She brings the case to this court, and the error assigned in this court occurred for the first time by said decision and judgment of the Supreme Court of the State of Illinois in reversing without remanding solely upon the statute in question. This court, therefore, will not search the entire record and retry or review all the

other questions passed upon by the jury and the trial court. The case was decided in the Supreme Court of Illinois upon a single ground, the one upon which the case is brought to this court, and

(c) For the further reason that where by the decision and judgment of the state court there is drawn in question, the validity of a state statute and the decision is in favor of the validity, and if this court decides that the state court committed error as a question of constitutional law, it will not search the entire record in the hope or with the view of finding some other question of fact or of general law or of local state procedure upon which the decision of the state court might have been justified, but was not.

McLaughlin v. *Fowler*, 154 U. S. 663.

St. Louis, Iron Mountain & Southern Ry. Co. v. *McWhirter*, 229 U. S. 265, see page 276.

Henderson Bridge Co. v. *Henderson City*, 173 U. S. 592, see page 608.

Arkansas Southern Railroad Co. v. *German Bank*, 207 U. S. 270, see page 275.

Roger v. *Hennepin County*, 240 U. S. 184, see page 188.

(d) For the further reason that to print the entire bill of exceptions would unnecessarily encumber the record and place an unjust hardship upon the plaintiff in error as appears from the attached affidavit.

ALMON W. BULKLEY,
C. E. MORE,
C. PAUL TALLMADGE,
Attorneys for Plaintiff in Error.

State of Illinois,}
County of Cook. }ss.

Sarah M. Wall, plaintiff herein, deposes and says that the estimate of James D. Maher, clerk of the Supreme Court of the United States, of the clerk's costs and cost of printing the record in this case with the briefs and arguments of the Supreme Court of Illinois and the entire bill of exceptions incorporated therein amounts to $1,180.

Affiant further avers that she is worth less than the sum of $500, and that she has no income or revenue from any source whatsoever other than her daily earnings.

Further affiant saith not.

Sarah M. Wall.

Subscribed and sworn to before me this 30th day of April, A. D. 1920.

Florence Gallivan,
(Notarial Seal) *Notary Public.*

Office Supreme Court, U. S.
FILED
MAY 13 1920
JAMES D. MAHER,
CLERK.

No. [redacted] 237

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1919.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall,
Plaintiff in Error,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant in Error.

Writ of Error to Supreme Court of Illinois.

REPLY TO MOTIONS OF PLAINTIFF IN ERROR TO STRIKE PORTIONS OF RECORD, ETC.

WORTH E. CAYLOR,
Attorney for Defendant in Error.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1919.

No. 705.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall,
Plaintiff in Error,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant in Error.

Writ of Error to Supreme Court of Illinois.

REPLY TO MOTIONS OF PLAINTIFF IN ERROR TO STRIKE PORTIONS OF RECORD, ETC.

MAY IT PLEASE THE COURT:

The defendant in error, Chesapeake & Ohio Railway Company, has been served with notice and copy of a motion that on May 10, 1920, at the opening of court, the attorneys for the plaintiff in error would present a motion to strike from the record briefs, etc.

The following objections to the motion are respectfully brought to the attention of the court to be considered, should the motion be taken up for considera-

tion at a subsequent time, the court not sitting on May 10, 1920.

1. The first part of the motion of plaintiff in error is to strike from the record the original brief and argument and reply brief of the attorney for the Chesapeake & Ohio Railway Company, plaintiff in error, in the Supreme Court of Illinois, and the brief and argument of the attorneys for Sarah Mary Wall, defendant in error, in the same court, and also that the clerk of the court be directed to omit such briefs and argument from the printed record.

The time is not opportune for such motion, for until the record be printed so that it can be examined by the members of this court the reasons for any such motions as are now made are not obvious for consideration.

The last paragraph of Section 1 of Rule 8 of this court provides that in case portions of the record are unnecessary to a proper presentation of the case, the court may order the cost of supervision and printing to be paid by the defendant. At this time, prior to the printing of the record, the necessity of any portion of the record can not be apparent to the court, and the part of the record that is asked to be stricken may be necessary for the court to fairly consider the errors assigned.

It may be said now that at a subsequent time a motion will be made by the attorney for the defendant in error to dismiss the writ of error issued in this case, and at which time it will be necessary, because of the practice in the Supreme Court of Illinois, to inspect and consider the briefs mentioned in the first part of this motion. Briefs and argu-

ments of counsel have been inspected by this court to determine whether "errors assigned but not noticed or relied on in brief and argument by counsel will be regarded as waived or abandoned." *Hulbert* v. *Chicago*, 202 U. S. 275, 281.

2. Counsel for plaintiff in error further move the court that the clerk be instructed to omit from the printed record the bill of exceptions. The reasons for this motion being that to print the entire bill of exceptions would be a hardship on the plaintiff in error, and also that the court will only consider the error of the Supreme Court of Illinois, as claimed by the plaintiff in error, in erroneously deciding a federal question.

This case was brought by the plaintiff in error in the Circuit Court of Cook County, Illinois, where a judgment was entered in her favor against the defendant in error. This judgment was appealed from to the Appellate Court for the First District of Illinois, which court affirmed the judgment of the Circuit Court. The case was then taken by defendant in error on a writ of error to the Supreme Court of Illinois, which court reversed the judgments of the Appellate Court and the Circuit Court.

The record discloses that many errors were assigned in the Supreme Court of Illinois by the Chesapeake & Ohio Railway Company, the defendant in error, so that part of the record, the bill of exceptions, which shows the facts and circumstances because of which the errors were assigned is absolutely necessary for a proper consideration of the case by this court. The purpose of the attorneys for the plaintiff in error in making

this motion is to prevent a review of all of the errors assigned and preserved in the record and to limit this court to the one error now for the first time raised,—that the Supreme Court of Illinois committed error in improperly deciding a federal question. While it will be contended by counsel for defendant in error that no such error was committed by the Supreme Court of Illinois, and that no federal question was raised in any court of Illinois by plaintiff in error, yet, should this court think differently from counsel for defendant in error on this particular question, it is respectfully contended that it would be the most serious injustice to preclude the defendant in error from raising in this court the many errors properly assigned by it in the record. The practice in this court is entirely different from that urged by the counsel for plaintiff in error. See *Murdock* v. *Memphis*, 20 Wall. 590; *McLaughlin* v. *Fowler*, 154 U. S. 663.

For the above reasons it is asked that the motion of plaintiff in error be denied.

Respectfully submitted,

Worth E. Taylor

Attorney for Defendant in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1920.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, deceased,
Plaintiff in Error,
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant in Error.

No. 237.

MOTION TO DISMISS WRIT OF ERROR.

Now comes the Chesapeake and Ohio Railway Company, defendant in error, by its attorney, Worth E. Caylor, and moves the court that the writ of error heretofore issued in this cause be dismissed for want of jurisdiction.

Worth E. Caylor

Attorney for Chesapeake and Ohio Railway Company, Defendant in Error.

BRIEF.

I.

MAY IT PLEASE THE COURT:

The above cause is in this court by virtue of a writ of error issued to the Supreme Court of the State of Illinois. The case there arose on a writ of error to review a judgment of the Appellate Court of that State, affirming a judgment for $10,000 of the Circuit Court of Cook County in favor of the present plaintiff in error. She had there brought an action in case, alleging the death of her husband because of the wrongful act of the present defendant in error, occurring in the State of Ohio.

The history of this litigation is stated in the first part of the opinion of the Supreme Court of Illinois. (Printed Transcript of Record, p. 18.)

An inspection of the transcript of record filed in this cause shows that the errors assigned (Printed Transcript of Record, pages 31, 32) were not directly or indirectly brought to the attention of the Supreme Court of Illinois, and were not considered by that court in its opinion. (Printed Transcript of Record, pages 18 to 22).

An inspection of the record filed in this cause, but not printed, and of all the proceedings in all the courts will show likewise that the errors now assigned were not raised, spoken, or written about, or in any way referred to, either directly or indirectly,

except in the petition for re-hearing filed in the Supreme Court of Illinois. (Printed Transcript of Record, pages 24 to 29).

The petition for re-hearing was denied without further opinion by a simple order of court. (Printed Transcript of Record, page 30).

The question as to the jurisdiction of the courts of Illinois was at all times raised by the Chesapeake and Ohio Railway Company, defendant in error, through its counsel, because of Section 2 of Chapter 70 of the Injuries Act (Hurd's Illinois Statutes), wherein it is declared "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state." At no time and in no manner was the attention of the Supreme Court of Illinois, or any other Illinois court, by pleading, brief, argument or opinion, except in the petition for re-hearing, as mentioned above, called to a claim of plaintiff in error that her constitutional rights were infringed or violated by this particular statute.

II.

In order to give this court the power to review the judgment of the Supreme Court of Illinois, the constitutional right must be specifically claimed by the plaintiff in error at the proper time and in the proper way. It must have been called to the attention of the Supreme Court of Illinois prior to its decision, and the decision of the court must have been against the right claimed.

Hulbert v. *Chicago*, 202 U. S. 275, 280, 281.
Willoughby v. *Chicago*, 235 U. S. 45.

F. G. Oxley Stave Co. v. *Butler County*, 166 U. S. 648.

Seyward v. *Denny*, 158 U. S. 180, 186.

Levy v. *Superior Court*, 167 U. S. 175, 177.

Chicago & N. W. R. Co. v. *Chicago*, 164 U. S. 454, 457.

Ansbro v. *United States*, 159 U. S. 695, 698.

Keokuk & H. Bridge Co. v. *Illinois*, 175 U. S. 626.

Hoyt v. *Sheldon* (*Hoyt* v. *Thompson*), 1 Black, 518, 521.

Marvin v. *Trout*, 199 U. S. 212, 223.

It must appear that the particular federal question sought to be raised here was also decided in the Supreme Court of Illinois.

Capital City Dairy Co. v. *Ohio*, 183 U. S. 238, 248.

Chapin v. *Fye*, 179 U. S. 127.

The fact that the opinion of the State Court makes no reference to the particular constitutional right now claimed to be infringed may be considered in determining whether the question was called to the attention of the State Court.

F. G. Oxley Stave Co. v. *Butler County*, 166 U. S. 648, 653, 655.

Kipley v. *Illinois*, 170 U. S. 182, 186.

Chicago & N. W. R. Co. v. *Chicago*, 164 U. S. 454.

Michigan Sugar Co. v. *Michigan*, 185 U. S. 112, 113.

New York C. & H. R. R. Co. v. *New York*, 186 U. S. 269, 273.

It is too late to raise a federal question for the first time in a petition for re-hearing, after the final judgment of the State Court of last resort.

McCorquodale v. *State of Texas*, 211 U. S. 432.

Mallett v. *State of N. Carolina*, 181 U. S. 589.

McMillen v. *Ferrum Mining Co.*, 197 U. S. 343.

Consolidated Turnpike Co. et al. v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 326.

Miller v. *Texas*, 153 U. S. 535.

Miller v. *Cornwall R. R. Co.*, 168 U. S. 131.

It is, therefore, respectfully urged that the writ of error be dismissed.

North E. Cay 6r

Attorney for Defendant in Error.

Office Supreme Court, U. S.
FILED
OCT 30 1920
JAMES D. MAHER,
CLERK.

No. 237.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, deceased,
Plaintiff in Error,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

REPLY TO BRIEF AND ARGUMENT IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

WORTH E. CAYLOR,
Attorney for Defendant in Error.

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IN THE

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OCTOBER TERM, A. D. 1920.

No. 705.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall,
Plaintiff in Error,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

REPLY TO BRIEF AND ARGUMENT IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

MAY IT PLEASE THE COURT:

Counsel for the plaintiff in error, in their "brief and argument in opposition to motion to dismiss writ of error," concede that the points made why the writ of error should be dismissed are good, but seek to avoid their present position by saying that the plaintiff in error was never in a position to assign errors on the record raising the constitutional point.

A reference to the opinion of the Supreme Court of Illinois (Printed Transcript of Record, pages 18 to 22) shows that the validity of the Illinois statute in question

was presented by both parties for the consideration of that court. That court says:

> "Many errors are relied upon for a reversal but the first point we shall determine is, whether or not the courts of Illinois have jurisdiction of this cause of action."

The court then discusses at great length the validity of the statute and especially considers whether the statute is retroactive and whether the plaintiff had a vested right in this proceeding. The court concludes its discussion of this statute against the contention of the plaintiff, and held "the peremptory instruction requested by the defendant should have been given." This instruction was asked in the trial court by the defendant at the close of all the evidence, asking the court to instruct the jury to find the defendant not guilty. The motion was overruled and the defendant excepted to the ruling of the court. (Printed Transcript of Record, page 19.)

This court, in the case of *Seaboard Air Line Railway* v. *Duvall,* 225 U. S. 477, at pages 486, 487 and 488, discusses the method by which a litigant wishing to present a federal right should act. Quoting with approval the language in another case, the court says:

> "'Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court.' * * * It was the obvious duty of counsel if they wished any particular construction of the act, to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right 'specially set up' and denied by the court. 'It must appear on the face of the record that it was in fact raised; that the judicial

mind of the court was exercised upon it; and then a decision against the right claimed under it.'"

At the time the motion was made to instruct the jury in the trial court, counsel for the plaintiff could have objected to this motion for the reason that the statute relied upon and interposed by the defendant violated her constitutional rights. This contention could have been preserved in the bill of exceptions. Counsel again, in the Appellate Court of Illinois, when this statute was being discussed before that court, it being jurisdictional, could have properly urged for consideration the same violation of her constitutional rights. In the Supreme Court of Illinois, under the practice in that court, when this statute was brought up for consideration, and its validity and applicability were being urged by counsel for the defendant, the present plaintiff in error could have then urged to the Supreme Court the fact that this statute violated her rights under the Constitution of the United States of America. But the record brought to this court shows an entire absence of any such contention on the part of the present plaintiff in error.

It is wrong for counsel for plaintiff in error to assert that she was foreclosed from raising the federal question until it was raised in this court, as they do in their brief and argument in this language: "It is uncontrovertible, in view of the situation of the parties, that she could not properly raise upon the face of the record the unconstitutionality of the statute until and precisely as she did when the first opportunity offered."

The plain inference from their argument is that the statute in question was not discussed and its invalidity not urged by them in any court, because the courts of Illinois had uniformly sustained their position up to the time of the opinion of the Supreme Court. If this is the

inference they seek to give, without having a record to sustain such statement, it is no more than proper to say here that such statement is absolutely unwarranted by the facts. The validity of this statute was brought into question by both parties in the trial court, in the Appellate Court and in the Supreme Court and in no way was the constitutional question raised or even remotely referred to.

As stated before, the charge of unconstitutionality could have been raised at the trial and preserved in the bill of exceptions. It could have been raised in the Appellate Court of Illinois and also in the Supreme Court, especially so when at all times they urged the invalidity of the statute for other reasons. It does not appear affirmatively or otherwise that the federal question now presented for decision was ever properly raised in any court of Illinois.

Respectfully submitted,

Worth E. Taylor

Attorney for Defendant in Error.

Office Supreme Court, U. S.
FILED
SEP 28 1920
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1920.

SARAH MARY WALL, administratrix of the estate of Edward Wall, deceased,
Plaintiff in Error,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant in Error.

No. 287

Brief and Argument for Plaintiff in Error.

ALMON W. BULKLEY,
CLAIR E. MORE,
C. PAUL TALLMADGE,
Attorneys for Plaintiff in Error.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

SARAH MARY WALL, administratrix of the estate of Edward Wall, deceased, *Plaintiff in Error,* vs. CHESAPEAKE & OHIO RAILWAY COMPANY, *Defendant in Error.*	No. 237

Brief and Argument for Plaintiff in Error.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This writ of error calls into question the propriety of a judgment of the Supreme Court of the State of Illinois. That court reversed a judgment in favor of the plaintiff in error in the sum of ten thousand dollars ($10,000) upon the ground that an Illinois statute, passed while the action was pending in the Illinois courts, forbade the continuation of jurisdiction in a case of this character.

The plaintiff's husband was killed on a Chesapeake and Ohio train in Cincinnati, Ohio. A statute of Ohio created a right of action for wrongful

death, substantially similar to the so-called Lord Campbell's Act of most of our states.

Upon this Ohio statute the plaintiff brought action in Illinois, counting specially upon and setting forth such statute. It was then the settled policy of the courts of Illinois to entertain actions at law for death occurring outside the state, and such jurisdiction was frequently invoked.

After this case had been pending in the Illinois courts until the cause of action had become outlawed elsewhere, a statute was passed, or more accurately stating, a proviso was added to the former law as follows:

> "Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state." • • •

The Supreme Court of Illinois by its decision in this case has construed this statute as meaning that in all death cases arising under the laws of sister states, including those of which it had taken and retained jurisdiction until it had acquired the only subsisting remedy by lapse of time, nevertheless further prosecution in its courts must cease forthwith regardless of the fact that it had assumed and retained jurisdiction until there was none other.

The question involved upon this record therefore is: Can the laws of one state conformably to the requirements of the federal constitution assume jurisdiction of a cause of action created by and arising under the laws of a sister state and retain such jurisdiction until the cause of action is outlawed in every other court, then renounce and aban-

don jurisdiction, thereby effectively destroying the cause of action itself by such manipulation of the remedy.

The plaintiff's intestate was killed in May, 1896. After seven years had elapsed, and the action for his death was pending in the Illinois courts, the proviso quoted above was passed by the Illinois legislature, and went into force July 1, 1903. The Ohio statute giving a right of action for death was, during this entire period of time, and still is, in full force and effect.

THE ORIGINAL ILLINOIS LORD CAMPBELL'S ACT.

The original Act of 1853 of the State of Illinois, giving a right of action for wrongful death, is as follows:

"SEC. 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN THE GENERAL ASSEMBLY, That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation, which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"SEC. II. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed

to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: PROVIDED, That every such action shall be commenced within two years after the death of such person."

THE OHIO STATUTE.

The Ohio statute was and is as follows:

"Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the corporation which, or the person who would have been liable if death had not ensued, or the administrator or the executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter; and when the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person.

"Every such action shall be for the exclusive benefit of the wife, the husband and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the de-

ceased person; and in every action, the jury may give such damages, not exceeding in any case $10,000, as they may think proportioned to the pecuniary injury resulting from such death, to the persons respectively for whose benefit such action shall be brought; every such action shall be commenced within two years after the death of such deceased person. Such personal representative if he was appointed in this state, with the consent of the court making such appointment, may at any time, before or after the commencement of the suit, settle with the defendant the amount to be paid. And the amount received by such personal representative, whether by settlement or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves by the court making the appointment in such manner as shall be fair and equitable, having reference to the age and conditions of such beneficiaries and the laws of descent and distribution of personal estates left by persons dying intestate."

THE ILLINOIS LORD CAMPBELL'S ACT AS AMENDED IN 1903.

In 1903 the foregoing act was amended, that is to say, Section I remained the same; Section II was amended to read as follows:

"2. Every such action shall be brought by and in the names of the personal representatives of such deceased person and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law. In the relation of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and

just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person not exceeding the sum of ten thousand dollars: PROVIDED, That every such action shall be commenced within one year after the death of such person. PROVIDED FURTHER, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State, and that the increase from five thousand to ten thousand dollars in the amount hereby authorized to be recovered shall apply only in cases when death hereafter occurs."

SPECIFICATIONS OF ERRORS RELIED UPON.

The Supreme Court of Illinois erred in that it did not hold said proviso (passed in 1903) to said act, void, for the reason that

(1) Said act (the last proviso thereof), as construed, interpreted and applied by the Supreme Court of Illinois, violated Section 1, Article 4, of the United States Constitution;

(2) Said act (the last proviso thereof), as construed and applied by the Supreme Court of Illinois, violated the provisions of Section 1, of the 14th Amendment to the Constitution of the United States, in that it deprived the plaintiff in error of property without due process of law;

(3) Said act (the last proviso thereof), as construed and applied by the Supreme Court of Illinois, did not give full faith and credit to the public acts of every other state, as guaranteed by Section 1 of Article 4 of the Constitution of the United States;

(4) Said act (the last proviso thereof), as construed and applied by the Supreme Court of Illinois, did abridge the privileges and amenities of the petitioner, as guaranteed by Section 1 of the 14th Amendment to the Federal Constitution.

BRIEF.

I.

A judgment of a state court upholding a statute that was invalid as construed is reviewable by writ of error.

Kenney v. *Supreme Lodge of the World, Loyal Order of Moose*, 40 Sup. Ct. Rep. 371.

II.

A state legislature without power to take away or impair a right cannot do so indirectly by removing all remedy. Arbitrary and unreasonable statutes of limitation are illustrative of this.

Kashkonong v. *Burton*, 104 U. S. 668, at page 675.

Terry v. *Anderson*, 95 U. S. 628, at page 633.

Saulsbury v. *Hughes*, 174 Ind. 638, at page 640.

III.

Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of any other state.

Article IV, Sec. 1, U. S. Constitution.

IV.

The "full faith and credit clause" is broad and comprehensive enough to compel one state, notwithstanding its public policy, to enforce a judgment of another state based upon a cause of action accruing in the former state where it is illegal and void.

Fauntleroy v. *Lum*, 210 U. S. 230.

V.

The "full faith and credit" clause will compel the State of Illinois, its policy to the contrary notwithstanding, to take jurisdiction and enforce a judgment of another state though based upon a death statute.

Kenney v. *Supreme Lodge of the World, Loyal Order of Moose*, 40 Sup. Ct. Rep. 371.

VI.

Prior to the amendment in 1903 to the Lord Campbell's act of Illinois, it was the policy of that state to entertain causes of action for death arising upon the statutes of other states.

Chicago & E. I. R. R. Co. v. *Rouse*, 178 Ill. 132.

VII.

Since the 14th Amendment to the United States Constitution, when a cause of action has once accrued even though it be a statutory cause, the state cannot withdraw the remedy without reasonable provision for pending action without violating section 1 of said amendment.

Ettor v. *City of Tacoma*, 228 U. S. 148.

VIII.

A remedy is nothing more than the means provided by law for the enforcement of rights, and is not of itself a right except that where there exists but a single remedy for the enforcement of a vested right such remedy cannot be wholly taken away without providing some other reasonable, convenient and efficient means of enforcement without violating the Constitution, since a withdrawal of all legal means for the enforcement of a right is equivalent to a subversion of the right itself.

Sansberry v. *Hughes*, 174 Ind. 638, 640.

IX.

If the death statute of a sister state is substantially similar to the death statute of the State of Illinois, then the public policy of the two states concur, and the death statutes of the sister state cannot be said to contravene the public policy of Illinois.

Mo. Pac. R. R. Co. v. *Larussi*, U. S. Circuit Court of Appeals, 7th District, 161 Fed. 66.

Texas & Pacific Ry. Co. v. *Cox*, 145 U. S. 593, 605.

Stewart v. *Baltimore & Ohio Ry. Co.*, 168 U. S. 445, 448.

X.

A statute which gives a right of action for death, thus altering the common law and imposing a new liability, is not a statute penal in its nature, but merely authorizes a civil action to recover damages for a civil injury and is enforcible in any court of any state having jurisdiction.

Dennick v. *Railroad Co.*, 103 U. S. 11.

Brady v. *Daley*, 175 U. S. 148, 156.

Texas & Pacific Ry. Co. v. *Cox*, 145 U. S. 593, 604.

Stewart v. *Baltimore & Ohio Ry. Co.*, 168 U. S. 445, 448.

XI.

To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of the laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of the citizens.

Northern Pacific Railroad v. *Babcock*, 154 U. S. 190, 198.

ARGUMENT.

The Theory of the Decision of the Illinois Supreme Court and Its Error.

We invite the court's attention, first, to the opinion of the Supreme Court of Illinois. We do this as the quickest and easiest way to center this court's attention upon the single question in the case. That opinion proceeds upon the theory that a right of action or special remedy not arising under the principles of the common law nor created by contract, but given by statute, is not a vested right, and can be taken away any time before final judgment either by a repeal of the statute itself or an entire withdrawal of the remedy. The Illinois court further says that there is no vested right in a public law, which is not in the nature of a private grant and that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them.

The obvious answer to this misapplied theory is that whether or not a state may have the power to destroy a statutory right of action, which it has itself created, nevertheless one state cannot destroy a cause of action created by the public acts or laws of a sister state and thereby comport with the full faith and credit clause of the Federal Constitution.

This cause of action was created by and arose under the public acts or laws of Ohio. It, therefore, must be conceded that only the properly constituted

authorities in Ohio could sweep away or abolish the cause of action itself. This statute of Ohio, during all the time, has been kept and still is in full force and effect. This being so, it follows as night follows day that the cause of action itself was inviolable to the Illinois authorities and the Illinois courts.

The Illinois authorities and the Illinois courts were powerless to nullify or abridge the cause of action itself, which was created by the laws of another state.

If this action, therefore, was properly brought in the Illinois courts and was properly pending in Illinois, it occupied, as far as that jurisdiction (the forum) was concerned, precisely the same status as if it had arisen by contract or under the common law. It was in a jurisdiction, whose duties and powers were limited to those of the forum in the appropriate and proper sense of that term.

Laws of procedure, laws of remedy, when they did not effectively strike down and destroy the cause of action itself were entirely proper.

It is unnecessary to argue that for a court to assume and exercise jurisdiction in an action until it had become outlawed in every other court in the republic, and then summarily abandon jurisdiction, effectively destroys the cause of action.

If the Illinois statute in question cannot be sustained either on the ground that the Illinois legislature possessed the power to directly destroy the cause of action itself or on the ground that this was merely a proper procedural statute, regulatory of the remedy, it is necessarily invalid.

The Illinois Proviso of 1903 cannot be upheld on the basis of being merely a law of procedure regulating the remedy. It was a statute of nullification abolishing all remedy.

Full Faith and Credit vs. Public Policy of a State.

When a person finds a court into which he has a right to go upon a foreign judgment or public statute, then the effect to be given that statute or judgment is fixed by the federal constitution. The phrase, "full faith and credit," denotes matter of substance and not of shadow. It means "full" in the sense of complete, permanent and substantial faith and credit as distinguished from temporary, ostensible and partial. The words, "full faith and credit," must appeal to a sober mind as mockery if they mean that they shall be extended to a citizen rightfully in a court upon a foreign statute or judgment until too late to invoke any other forum, and then all faith, credit and recognition may be withdrawn.

No one contends that a state may not change its public policy, but if that public policy vacillates or changes so suddenly, arbitrarily or unreasonably as to completely destroy substantive rights, created by the laws of another state and protected by the federal constitution, it must to that extent yield.

In *Kenny* v. *Supreme Lodge of the World, Loyal Order of Moose*, 40 Supreme Court Reporter, 371, it contravened the public policy of the State of Illinois to enforce a judgment of a foreign state which

arose upon a death statute of Alabama and the Illinois court refused so to do, but this court overruled such refusal.

In *Fauntleroy* v. *Lum*, 210 U. S. 230, a cause of action arose in Mississippi where it was illegal and void. A judgment was obtained upon it in Missouri and taken back to Mississippi to be enforced. The State of Mississippi, on the ground of public policy, refused to enforce such judgment based on a cause of action illegal and void there, but this court by its decision compelled it so to do, its public policy to the contrary notwithstanding.

Citizens of the United States are not to be divested of substantive rights which have already accrued and are protected by the Federal constitution by having them suddenly and completely destroyed by swift and arbitrary changes in the public policy of a given state. There is no magic in the phrase, "public policy," that make it so omnipotent that a state can validly promulgate any legislation it sees fit regardless of the United States constitution. The foregoing cases illustrate where it has been forced to give way and yield to the higher law.

Public Policy Theory Unsound.

The case at bar presents strong condemnation of such legislation. In the instant case it is difficult for an impartial mind to recognize any public policy. The State of Illinois has a death statute of its own. It suddenly refuses to continue jurisdiction over a cause of action, based upon a similar statute of another state. Having just such a death statute

it is difficult to see how its public policy was actively contravened. Nevertheless, under this thin veil of so-called public policy it struck down and completely destroyed the plaintiff's accrued cause of action and abruptly ejected her from its courts at an hour so late that resort to any other forum would be futile.

In *Missouri Pac. Ry. Co.* v. *Larussi*, reported in 161 Federal, 66, an action for wrongful death arising under a statute of Kansas was brought in the Federal court sitting in Illinois. An objection was raised to its enforcement in the Federal court sitting in Illinois upon the ground of public policy as evidenced by the Illinois statute against the recovery of damages for death accruing outside the state. The Circuit Court of Appeals, speaking through Justice Seaman stated:

> "Whether such enforcement may be subjected to the further test mentioned in *Texas & Pacific Railway Co.* v. *Cox*, 145 U. S. 593, 605, 12 Sup. Ct. 908, 36 L. Ed. 829, namely, that 'the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced'—is a question not involved here for solution, as the terms of the statute in Illinois creating the cause of action are substantially identical with those of the Kansas statute. Both provide alike to remove the common law bar and establish a cause of action for a tort (committed in the state) which causes death. The right of recovery in the case at bar rests alone on the statute of Kansas—is 'governed by the *lex loci*, and not by the *lex fori*.' *Northern Pacific Railroad* v. *Babcock*, 154 U. S. 190, 199; 14 Sup. Ct. 978, 981; 38 L. Ed. 958. As the law of Illinois concurs in this policy in creating the cause of action, the test referred to is

> met, if applicable; and whether the remedial provisions in Kansas and Illinois are alike or unlike is immaterial under either view."

In *Texas & Pacific Railway Co.* v. *Cox*, 145 U. S. 593, plaintiff's intestate was killed in Louisiana. Action was instituted in the Federal court sitting in Texas. It was urged that the cause of action founded upon the statute of Louisiana conferring the right to recover damages for an injury or death was not enforceable in Texas. Mr. Chief Justice Fuller states:

> "The statutes of these two states on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the State of Texas."

In *Stewart* v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445, p. 450, action was brought in the District of Columbia to recover damages for death which occurred in the State of Maryland. After examining the two statutes, this court said, page 450:

> "We cannot think that these differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the district for the benefit of the persons designated in the statute of Maryland."

On this same subject Mr. Justice White, in delivering the opinion of this court in *Northern Pacific Railroad* v. *Babcock*, 154 U. S. 190, p. 198, stated:

> "But it by no means follows that, because the statute of one state differs from the law of an-

other state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the State of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

"This opinion of the Supreme Court of Minnesota is in accord with the rule announced by Chief Justice Marshall in *The Antelope*, 10 Wheat. 66. In referring to that case in *Texas and Pacific Railway* v. *Cox*, 145 U. S. 593, the court said: 'The courts of no country execute the penal laws of another. But we have held that that rule cannot be invoked as applied to a statute of this kind, which merely authorizes a civil action to recover damages for a civil injury.' The rule thus enunciated has been adopted in previous cases, and has since been approved by this court. *Smith* v. *Condry*, 1 How. 28; *The China*, 7 Wall. 53, 64; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *The Scotland*, 105 U. S. 24, 29; *Huntington* v. *Attrill*, 146 U. S. 657, 670. Indeed, in *Texas and Pacific Railway Co.* v. *Cox*, *supra*, Mr. Chief Justice Fuller, speaking for the court, said: 'The question,

however, is one of general law, and we regard it is settled in *Dennick* v. *Railroad Co.*"

Let it be said what may, the naked analysis of this case reveals the fact that a litigant who in good faith, went into the Illinois court where she lawfully had a right to go, and the State of Illinois, through its courts, received her and her cause of action and proceeded to administer justice, but so manipulated the remedy by undertaking to hear and determine the case and holding jurisdiction over it until it had become the only possible forum, and then and not until then refusing to be the forum, thereby as effectively tricked and entrapped a litigant who in good faith had gone into the court, into losing her entire right of action, as if bad faith were actually employed.

Since the recent decision of this court in the case of *Kenney* v. *Supreme Lodge of the World, Loyal Order of Moose*, 40 Supreme Court Reporter, 371, it is doubtful if the provision of the Illinois statute in question has any validity whatsoever. In the *Kenney* case this court held that the State of Illinois was bound to take jurisdiction when requested so to do of a cause of action arising upon a judgment for death in another state. It is difficult to see and would require much finesse of reasoning to show how one state may be compelled to take jurisdiction of a cause of action arising upon a judgment for death in another state and at same time be excused from taking jurisdiction of a cause of action arising upon a death statute of another state. The United States constitution makes no distinction as to the *quantum* of faith and credit to be given to the public acts or

judicial proceedings of another state. Both are precisely the same. It is neither more nor less in the one case than in the other, in fact, they are both given in the same sentence, "Full faith shall be given to the public acts, records and judicial proceedings."

IF CAUSE OF ACTION IS NOT PENAL, THEN THERE IS NO DISTINCTION BETWEEN A STATUTORY CAUSE OF ACTION AND ONE BASED ON A CONTRACT OR ARISING UNDER THE COMMON LAW, AS TO WHERE IT CAN BE ENFORCED.

This court in a leading and much cited case entitled *Dennick* v. *Railroad Company*, 103 U. S. Rep. 11, in discussing a cause of action predicated upon a death statute of a state, said (p. 17):

> "It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.
>
> "It is difficult indeed to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right.
>
> "Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

It will hardly be denied in this case that the 1903 proviso in question, to the Illinois statute, would be invalid if it related to a cause of action arising on a contract or under the common law.

To the same effect as the *Dennick* case is *Ettor v. City of Tacoma*, 228 U. S. 148, a case to which we attach great importance as decisive of the case at bar. In the latter case the common law of the State of Washington did not furnish a cause of action for damages to the property of an abutting owner resulting from street gradings by the city, on the ground that the city was merely an instrumentality of the state. However, in 1907 the legislature created a cause of action, and while such statute was in force a cause of action accrued to the plaintiff, which he proceeded to enforce in the courts of Washington; but while his action was pending the law was repealed. Excerpts from the opinion of this court illustrate the point. The court said:

> "When the attention of the trial court was called to this repealing act, it directed a verdict for the city on the theory that the right of action was statutory and fell with the statute, there being no saving clause. This judgment, upon the same ground, was affirmed by the Supreme Court of the state. * * *
>
> "For the plaintiffs in error the contention shortly stated is, that the act of 1907 was the sole legislative authority of the city for making the cuts and fills in front of their premises upon the public street, and that that act expressly required the city to make provision for compensating the owner so damaged and that their right to compensation having accrued while the act was in force cannot be destroyed by subsequent legislation without a violation of the

rights guaranteed by the Fourteenth Amendment. * * *

"The defense of the city that it was but the agent of the state in improving the highways of the state, and therefore immune, because the state was immune, vanishes in the face of the fact that the state had absolutely coupled authority in the matter with an obligation to make compensation. The city had no authority save that which came from the very act which imposed the obligation. It would seem to need no argument to establish the contention that the obligation to make compensation to these plaintiffs in error could not be destroyed by subsequent legislation. * * *

"The remedy, if the city disregarded the obligation, was that afforded by the common law for the breach of any valid contractual or statutory duty. * * *

"Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract, or deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authorities. * * *

"The court below gave a restrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforcible by a common law action for a breach of the statutory obligation.

"The necessary effect of the repealing act, as construed and applied by the court below,

> was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right."

The *Ettor* case is necessarily authority for the proposition that where a cause of action, which formerly did not exist, is given by statute and had actually accrued while the statute was in force, even the legislature of the state which created it cannot remove all remedy by restrospective law, the effect of which is to destroy the right.

In conclusion, we submit:

(1st) A right of action, if statutory, after it has actually accrued cannot be destroyed by subsequent legislation of that state, and certainly not by another state.

(2d) The 1903 proviso of the Illinois law in question, as construed and applied retrospectively in this case so as to destroy the right of action given by and arising under the public acts of a sister state, which had already accrued and upon which the cause of action was pending in the Illinois courts, is unconstitutional and void.

(3d) Neither the Illinois legislature nor the Illinois courts had the power to destroy the right of action created by and arising under the laws of Ohio, and therefore could not accomplish such result indirectly by taking jurisdiction and later, after the cause of action was outlawed elsewhere, forbid its further prosecution in Illinois. Such manipulation of the remedy is obnoxious both to section 1,

article 4, and section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4th) The legislature of one state cannot destroy a right of action created by the legislature of another state, either directly or indirectly.

(5th) The full "faith and credit" clause of the Federal Constitution requires that if one state takes jurisdiction and assumes to act upon a cause of action created by the laws of another state, it must act fairly and administer justice. It cannot take jurisdiction merely as a trap and hold the cause of action until outlawed elsewhere, and then abandon the jurisdiction which it voluntarily assumed to the complete destruction of the cause of action.

(6th) A state which is powerless to impair a given right of another state cannot completely destroy it by a manipulation of its laws of remedy and procedure. A right of action predicated upon the statutes of Ohio, which statutes still remain in force and have never been repealed, constitute a vested right in the plaintiff; and therefore, the decision of the Illinois Supreme Court in 1919 construing the Illinois statute as an abandonment of jurisdiction deprived the plaintiff of his property in violation of section 1 of the Fourteenth Amendment to the United States Constitution.

We therefore submit that the judgment of the Supreme Court of Illinois should be reversed.

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C. E. More,
C. Paul Tallmadge,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

SARAH MARY WALL, Administratrix of the Estate of Edward Wall, deceased,
Plaintiff in Error,
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant in Error.
No. 237.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

The above cause is in this court by virtue of a writ of error issued to the Supreme Court of the State of Illinois. The case there arose on a writ of error to review a judgment of the Appellate Court of that state, affirming the judgment for $10,000 of the Circuit Court of Cook County in favor of the present plaintiff in error. She had brought in the Circuit Court an action in case, alleging the death of her husband because of the wrongful act of the present defendant in error in the State of Ohio.

The history of this litigation and a general statement of the facts proved at the trial are stated in the first part of the opinion of the Supreme Court of Illinois. (Printed Transcript of record, p. 18.)

The printed transcript of record does not contain any part of the bill of exceptions, although it is a part of the transcript of the record. A few facts in the bill of exceptions ought to be considered by the court:

Edward Wall, at the time he was killed, was a resident and citizen of the State of Illinois. The accident causing his death occurred in Cincinnati, Ohio, and he died in Covington, Kentucky. Sarah Mary Wall, his widow, the administratrix of the estate of Edward Wall, deceased, is, and was likewise, a resident and citizen of the State of Illinois. The defendant, the Chesapeake and Ohio Railway Company, was and is a foreign corporation, and did not own, control or operate any railroad in the State of Illinois.

An inspection of the transcript of record filed in this cause shows that the errors assigned (Printed Transcript of Record, pp. 31, 32) were not directly or indirectly brought to the attention of the Supreme Court of Illinois, and were not considered by that court in its opinion. (Printed Transcript of Record, pp. 18 to 22.)

An inspection of the record filed in this cause, but not printed, and of all the proceedings in all the courts will show likewise that the errors now assigned were not raised, spoken or written about, or in any way referred to, either directly or indirectly, except in the petition for re-hearing filed in the Supreme Court of Illinois. (Printed Transcript of Record, pp. 24 to 29.)

The petition for re-hearing was denied without further opinion by a simple order of court. (Printed Transcript of Record, p. 30.)

The question as to the jurisdiction of the courts of Illinois was at all times raised by the Chesapeake and Ohio Railway Company, defendant in error, through its counsel, because of Section 2 of Chapter 70 of the In-

juries Act (Hurd's Illinois Statutes), wherein it is declared "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state." In the case of *Crane* v. *C. & W. I. R. R. Co.*, 233 Ill. 259, the Supreme Court of Illinois held that the language of the statute just quoted means both the wrongful act and death "occurring outside of this state." At no time and in no manner was the attention of the Supreme Court of Illinois, or any other Illinois court, by pleading, brief, argument or opinion, except in the petition for re-hearing, as mentioned above, called to a claim of plaintiff in error that her constitutional rights were infringed or violated by this particular statute.

A motion to dismiss the present writ of error was made by the defendant in error in this cause, but the consideration of this motion was postponed to the hearing of the case on its merits.

The points urged for consideration of this court are:

First: The writ of error should be dismissed for the reason that there was no Federal question sought to be raised by the plaintiff in error in the courts of Illinois, nor was there any Federal question considered or determined by any court of Illinois.

Second: The contention of the plaintiff in error does not present a Federal question.

BRIEF.

I.

THE WRIT OF ERROR SHOULD BE DISMISSED FOR THE REASON THAT THERE WAS NO FEDERAL QUESTION SOUGHT TO BE RAISED BY THE PLAINTIFF IN ERROR IN THE COURTS OF ILLINOIS, NOR WAS THERE ANY FEDERAL QUESTION CONSIDERED OR DETERMINED BY ANY COURT OF ILLINOIS.

In order to give this court the power to review the judgment of the Supreme Court of Illinois, the constitutional right must be specifically claimed by the plaintiff in error at the proper time and in the proper way. It must have been called to the attention of the Supreme Court of Illinois prior to its decision, and the decision of the court must have been against the right claimed.

Hulbert v. *Chicago*, 202 U. S. 275, 280, 281.

Willoughby v. *Chicago*, 235 U. S. 45.

Seaboard Air Line Ry. v. *Duvall*, 225 U. S. 477, 486, 487, 488.

F. G. Oxley Stave Co. v. *Butler County*, 166 U. S. 648.

Seyward v. *Denny*, 158 U. S. 180, 186.

Levy v. *Superior Court*, 167 U. S. 175, 177.

Chicago & N. W. R. Co. v. *Chicago*, 164 U. S. 454, 457.

Ansbro v. *United States*, 159 U. S. 695, 698.

Keokuk & H. Bridge Co. v. *Illinois*, 175 U. S. 626.

Hoyt v. *Sheldon* (*Hoyt* v. *Thompson*), 1 Black, 518, 521.

Marvin v. *Trout*, 199 U. S. 212, 223.

It must appear that the particular federal question sought to be raised here was also decided in the Supreme Court of Illinois.

Capital City Dairy Co. v. *Ohio*, 183 U. S. 238, 248.

Chapin v. *Fye*, 179 U. S. 127.

The fact that the opinion of the state court makes no reference to the particular constitutional right now claimed to be infringed may be considered in determining whether the question was called to the attention of the state court.

F. G. Oxley Stave Co. v. *Butler County*, 166 U. S. 648, 653, 655.

Kipley v. *Illinois*, 170 U. S. 182, 186.

Chicago & N. W. R. Co. v. *Chicago*, 164 U. S. 454.

Michigan Sugar Co. v. *Michigan*, 185 U. S. 112, 113.

New York C. & H. R. R. Co. v. *New York*, 186 U. S. 269, 273.

It is too late to raise a federal question for the first time in a petition for re-hearing, after the final judgment of the state court of last resort.

McCorquodale v. *State of Texas*, 211 U. S. 432.

Mallett v. *State of N. Carolina*, 181 U. S. 589.

McMillen v. *Ferrum Mining Co.*, 197 U. S. 343.

Consolidated Turnpike Co. et al. v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 326.

Miller v. *Texas*, 153 U. S. 535.

Miller v. *Cornwall R. R. Co.*, 168 U. S. 131.

Steines v. *Franklin County*, 81 U. S. 15, 22.

Counsel for plaintiff in error will not dispute the foregoing general propositions of law on this point as the authorities there cited are typical of the many that are being announced by this court at every session. They

seek to escape the force of these general principles by asserting in their briefs, filed on the motion to dismiss this suit, that the facts in the case at bar are different from those in the authorities cited.

(1) They assert that, having been successful in the *nisi prius* court, their Federal constitutional rights were not violated until the opinion was rendered by the Supreme Court of Illinois, and cite as an authority on that proposition, *Saunders* v. *Shaw*, 244 U. S. 316.

(2) They state that the opinion of the Supreme Court of Illinois shows upon its face that the Federal question was considered and passed upon adversely to the plaintiff in error, and cite *Mallinckrodt* v. *State of Missouri*, 238 U. S. 40, 41, *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248.

(3) They assert that it was impossible for the plaintiff in error to assign errors in the courts of Illinois until the Supreme Court of Illinois construed the statute in question retroactively and reversed the cause without remanding, citing, in support of this statement, the case of *Zading* v. *Baldwin*, 166 U. S. 485, 488, and other cases.

From these various contentions, made by the counsel for plaintiff in error, it can be plainly inferred that no Federal question was raised by plaintiff in error in any of the courts of Illinois. An inspection of the transcript of the record in this case shows that the Federal questions now interposed for consideration were in fact not raised by counsel for either party, directly or indirectly, at any time in the courts of Illinois, until they were mentioned by counsel for the present plaintiff in error in their petition for rehearing presented to the Supreme Court of Illinois.

The proposition announced by counsel for plaintiff in error, that a litigant need not present a Federal question

for consideration until his rights are affirmatively violated by a decision of a court, is novel in the extreme, and there is no authority upon which such a statement can be based.

In the case of *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477, at pages 486, 487 and 488, this court announces a contrary doctrine. Quoting with approval the language of this court in another case, the court discusses the method by which a litigant wishing to present a Federal right should act, as follows:

> "'Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court.' * * * It was the obvious duty of counsel if they wished any particular construction of the act, to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right 'specially set up' and denied by the court. 'It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and then a decision against the right claimed under it.'"

A reference to the opinion of the Supreme Court of Illinois (Printed Transcript of Record, pp. 18 to 22) shows that the validity of the Illinois statute in question was presented by both parties for the consideration of that court. That court says:

> "Many errors are relied upon for a reversal but the first point we shall determine is, whether or not the courts of Illinois have jurisdiction of this cause of action."

The court then discusses at great length the validity of the statute and especially considers whether the stat-

ute is retroactive and whether the plaintiff had a vested right in this proceeding. The court concludes its discussion of this statute against the contention of the plaintiff, and held "the peremptory instruction requested by the defendant should have been given." This instruction was asked in the trial court by the defendant at the close of all the evidence, asking the court to instruct the jury to find the defendant not guilty. The motion was overruled and the defendant excepted to the ruling of the court. (Printed Transcript of Record, p. 19.)

At the time the motion was made to instruct the jury to find the defendant not guilty in the trial court, counsel for the plaintiff could have objected to this motion for the reason that the statute relied upon and interposed by the defendant violated her constitutional rights. This contention could have been preserved in the bill of exceptions. Counsel again, in the Appellate Court of Illinois, when this statute was being discussed before that court, it being jurisdictional, could have properly urged for consideration the same violation of her constitutional rights. In the Supreme Court of Illinois, under the practice in that court, when this statute was brought up for consideration, and its validity and applicability were being urged by counsel for the defendant, the present plaintiff in error could have then urged to the Supreme Court the fact that this statute violated her rights under the Constitution of the United States of America. But the record brought to this court shows an entire absence of any such contention on the part of the present plaintiff in error.

An examination of the facts in the case of *Saunders* v. *Shaw,* 244 U. S 316, cited by counsel for plaintiff in error, shows an entirely different situation from that of the case at bar. In the trial court the plaintiff in the Saunders action was permitted to spread upon the record cer-

tain evidence which was held to be inadmissible. The defendant was not permitted, and in fact was not required, to introduce evidence to rebut the testimony already ruled to be inadmissible. The Supreme Court considered the evidence, reversed the decision of the trial court, and granted an injunction against the assessment upon the land owned by the plaintiff, without remanding the case. This court rightfully held that the defendant never had a proper opportunity to present his evidence and could not raise the question of an abridgement of his Federal rights.

In the case at bar the question as to the validity of the statute prohibiting the prosecution of this suit was brought to the attention of the trial court, the Appellate Court and the Supreme Court of Illinois, and upon each occasion the plaintiff in error had the right to urge in opposition to this contention of the defendant in error that the statute abridged her rights and privileges under the Federal constiution.

The second point urged by counsel for plaintiff in error, that the opinion of the Supreme Court of Illinois shows upon its face that the Federal question was considered and passed upon adversely to the plaintiff in error, is wholly without support. There is no reference whatsoever in the opinion, which directly or indirectly refers to the rights now claimed to be infringed. In the case of *Mallinckrodt* v. *State of Missouri*, 238 U. S. 40, 41, cited by counsel for plaintiff in error, this court stated:

> "It appears, however, from the opinion of the Supreme Court, that the question of equal protection under the Fourteenth Amendment was treated as being sufficiently raised, and was specifically dealt with, and ruled against plaintiff in error."

The statement of this court that the Federal question

was specifically dealt with in the opinion of the State court shows a different situation from the opinion of the Supreme Court of Illinois in the present case.

In the case of *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, cited by counsel for plaintiff in error, this court held that:

> "It appears that defendant expressly claimed immunity by reason of the act of Congress and the highest court of the state either decided or assumed that the record sufficiently presented a question of federal right, and decided against the party asserting that right."

Thus it would seem that the facts are not in any way similar.

The third point raised by the counsel for plaintiff in error, that it was impossible for the plaintiff in error to assign errors in the courts of Illinois until the Supreme Court of Illinois construed the statute in question retroactively and reversed the cause without remanding, is not supported by any of the authorities cited. This contention raised by counsel for plaintiff in error, if assented to, would set aside the law and all the rules announced by this court for the preservation of a Federal right by litigants. In every instance where a state court would pass upon a question without considering a Federal right or privilege, the unsuccessful litigant could always urge in this court that it was impossible for him to assign error until he had been ruled against by the state court. Thus the Supreme Court of a state could be charged with a remissness of its duty without having an opportunity to consider the Federal right claimed to be infringed.

The firmness with which this court has adhered to the doctrine that the Federal right claimed to be breached must specifically be brought to the attention of the state court so that the court may have the opportunity of con-

sidering and determining the same, and that all inferences are determined against the person claiming the Federal right is well exemplified in the language used by Mr. Justice Clifford in the conclusion of the case of *Steines* v. *Franklin County*, 81 U. S. 15, 23:

> "Even if it could be admitted that the questions suggested were raised in the case by the motion for rehearing, it certainly does not appear that either of them was decided in a way to give this court jurisdiction, as it is quite obvious that the motion may have been denied upon grounds altogether distinct from any question which is re-examinable in this court. All the information the record contains upon the subject is that the motion was subsequently overruled, unaccompanied by any statement as to the grounds of decision, but it is quite clear that it may have been denied because that objection to the bonds was not made in the bill of complaint, or because the subsequent Act of the Legislature confirmed the doings of the county court under the prior act, or because the court was of the opinion that the subsequent acts of the county court or other officers estopped the county from setting up that defense to the bonds in the hands of innocent holders, or for many other reasons which might be suggested, wholly irrespective of the questions which it is supposed may be re-examined in this court. Suppose, therefore, it does appear that one or more of the questions which give jurisdiction under such a writ of error was presented in the motion for rehearing, and that such a question may properly be presented in such a motion, still the motion to dismiss must prevail in this case, because the record shows that the motion might have been denied, upon other grounds, and it does not appear, even if those questions did arise in the case, that either of them was decided by the state court, or that the supposed erroneous rule was applied by the state court in disposing of the controversy."

II.

THE CONTENTION OF PLAINTIFF IN ERROR DOES NOT PRESENT A FEDERAL QUESTION.

Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions, where the cause of action has arisen outside its borders.

St. Louis, I. M. & S. Ry. Co. v. *Taylor*, 210 U. S. 281, 285.

Chambers v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 143.

An action for a tort can be maintained in a different state only where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.

Texas & Pacific Ry. Co. v. *Cox*, 145 U. S. 593, 605.

Stewart v. *Baltimore & O. R. R. Co.*, 168 U. S. 445, 448.

Dougherty v. *American McKenna Process Co.*, 255 Ill. 369.

Chicago & Eastern Illinois R. R. Co. v. *Rouse*, 178 Ill. 132.

There is no vested right in a public law which is not in the nature of a private grant.

Hathaway v. *Merchants Trust Co.*, 218 Ill. 580.

Spaulding v. *Wright*, 173 Ill. 127.

Storrs v. *St. Lukes Hospital*, 180 Ill. 368.

Chicago Title & Trust Co. v. *Brown*, 183 Ill. 42.

Dougherty v. *American McKenna Process Co.*, *supra.*

Sharp v. *Sharp*, 213 Ill. 332.

The statute prohibiting the prosecution of this suit is in effect a repeal of an existing remedy. Where the law gives a right, whether a cause of action or a remedy to enforce it, the repeal of the law takes away the right.

Vance v. *Rankin*, 194 Ill. 625.

Van Inwagen v. *City of Chicago*, 61 Ill. 542.

Crane v. *Chicago & Western Indiana R. R. Co.*, 233 Ill. 259.

South Carolina v. *Gaillard*, 101 U. S. 433.

Wilson v. *Head*, 184 Mass. 515.

There can be no vested right in a claim for damages for a tort not connected with or growing out of a contractual relation.

Louisiana v. *Mayor, etc. of New Orleans*, 109 U. S. 285.

Ettor v. *Tacoma*, 228 U. S. 146, 158.

12 Corpus Juris, 972.

From the "Specification of Errors Relied Upon" set forth in the brief and argument for plaintiff in error, and from the assignment of errors upon the record, the sections of the Federal Constitution claimed to be infringed are, Section 1 of Article 4, and Section 1 of the Fourteenth Amendment. Section 2 of Article 4 is not claimed to be infringed by the enactment of the statute in question. Plaintiff in error and the decedent, both having been citizens and residents of the State of Illinois, the plaintiff in error is only claiming that her privileges and immunities as a citizen of the State of Illinois, as granted under Section 1 of the Fourteenth Amendment, have been abridged by the statute prohibiting the prosecution of her suit.

This inquiry, then, is limited to the question whether the institution of this suit, prior to the enactment of the statute in 1903, granted to the plaintiff in error such

a property right that it could not be taken away by the act of the Illinois Legislature at a subsequent time. There is no question in this case of the privileges and immunities of a citizen of Ohio having been infringed by the Legislature of the State of Illinois, but it is altogether the question of the privilege and immunity of a citizen of the State of Illinois having been infringed by the Legislature of that State.

All the language of this court, announced in numbers of cases, about transitory actions, the right of a citizen of one state to use the courts of another state, and the right to sue the defendant wherever found, has nothing whatever to do with the consideration of this case.

The right to use the courts of Illinois by a citizen of Illinois is not ordinarily a Federal question, but the plaintiff in error urges that she has a vested property right in a cause of action granted to her by the State of Ohio and sought to be enforced in the courts of Illinois, and the bases of that right are Section 1, Article 4 of the Constitution and Section 1 of the Fourteenth Amendment.

The Supreme Court of Illinois, in the case of *Carlin* v. *Peerless Gas Light Co.*, 283 Ill. 142, at page 144, announces:

> "At common law no right of action existed in anyone to maintain an action against any person or corporation because of death of another by any wrongful act, neglect or default. A right of action for such cause was given by our Injuries Act, which was adopted in 1853, and which for the first time in this state created such cause of action and provided in whose name the suit should be brought, and how any money recovered should be distributed."

This statute, adopted in 1853, does not provide for the use of the courts of Illinois in enforcing a similar right of action arising from a statute of another state. There

is no statute of the State of Illinois which directly or indirectly permits such an action to be brought. *Dougherty* v. *McKenna Process Co.*, 255 Ill. 369, 370.

This court, in the case of *Chambers* v. *Baltimore & O. R. R. Co.*, 207 U. S. 142, has definitely decided that a state can determine the limits of the jurisdiction of its courts in actions of this kind.

A state can give and it can deny this kind of an action. Under the settled law of the State of Illinois the Legislature can take away the right of action for wrongful death and the law would then be the same as it was prior to 1853, when there was no such right of action. If the plaintiff in error had instituted a cause of action in the State of Illinois for a wrongful death occurring in the State of Illinois, such right of action could certainly be defeated by the Legislature repealing the act of 1853. But it is contended by the counsel for plaintiff in error that because the right of action arose by virtue of an Ohio statute, the State of Illinois cannot prohibit the prosecution of her cause of action pending in the courts of Illinois. This court, however, has said, in the case of *Chambers* v. *Baltimore & O. R. R. Co., supra*, that the State of Ohio could prohibit the institution of a cause of action arising in another state in the State of Ohio. Yet, according to the reasoning of the counsel for plaintiff in error, while the Legislature of Illinois might prohibit the institution of the action, the action having been instituted it can not prohibit the prosecution.

The case of *Ettor* v. *The City of Tacoma*, 228 U. S. 148, has been referred to by counsel for plaintiff in error in their brief in support of their contention. The case is not in point. In the Ettor case a right of action was created by the statute of the State of Washington. Under the statute the City of Tacoma was permitted to take from a citizen certain property rights in grading and

improving its streets. Acting under this authority the city actually took property or damaged property of a citizen. This court says about this act of the city:

> "The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed in the grading. It was a claim assignable and enforcible by a common law action for a breach of the statutory obligation."

In the present case the Legislature did not create any right of action or any remedy to enforce it. Nothing that was done by the State of Illinois gave the plaintiff any right, let alone a property right. Her claim was not assignable. Her claim was not based on a contract or an obligation. Her claim, if at all, was founded in tort. This court clearly distinguished between cases arising in tort from those arising in contract at the conclusion of its opinion in the Ettor case in construing four cases: *Yeaton* v. *United States*, 5 Cranch 281; *East Saginaw Salt and Mfg. Co.* v. *East Saginaw*, 13 Wall. 373; *Wisconsin & N. R. R. Co.* v. *Powers*, 191 U. S. 379; and *Louisiana ex. rel. Folson* v. *New Orleans*, 109 U. S. 285. All of these cases were cited in support of the action of the state court. This court held that they were not in point saying that the Yeaton case was a case of forfeiture and was not a contract; the East Saginaw Salt and Mfg. Co. case was a case dictated by public policy for the encouragement of industry, and a right created under it did not constitute a contract; and the statute considered in the Wisconsin & N. R. R. Co. case was a mere announcement of a public policy and did not constitute a contract. The last case construed by this court in its opinion in the Ettor case was the Louisiana *ex. rel.* Folson case, and this court says:

> "The case turned upon the distinction between liability for a tort and liability under a contract. In the instant case (the Ettor case) the action is neither

for a tort, nor for a penalty, nor for a forfeiture, but for injury to property actually accomplished before the repeal of the law under which the street was graded, which required compensation to be made. The right to compensation was a vested property right."

This brief can not be concluded in a better way than to use the language of Mr. Justice Moody in delivering the opinion of the court in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 285:

"This contention does not present a Federal question. Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142, 143."

It is urged, therefore, that this case should be dismissed for want of jurisdiction, or the decision of the Supreme Court of the State of Illinois should be affirmed.

Respectfully submitted,

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